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S. Hrg. 99-383

INTERCIRCUIT PANEL OF THE UNITED STATES ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 704

A BILL TO ESTABLISH AN INTERCIRCUIT PANEL, AND FOR OTHER PURPOSES

OCTOBER 9, 1985

Serial No. J-99-63

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

Page

Thurmond, Hon. Strom, a U.S. Senator from the State of South Carolina, chairman, Committee on the Judiciary 1
East, Hon. John P., a U.S. Senator from the State of North Carolina, chairman, Subcommittee on Courts 13, 43
Heflin, Hon. Howell, a U.S. Senator from the State of Alabama 46, 48
DeConcini, Hon. Dennis, a U.S. Senator from the State of Arizona 58

PROPOSED LEGISLATION

S. 704, a bill to establish an intercircuit panel, and for other purposes 3

CHRONOLOGICAL LIST OF WITNESSES

Spears, Hon. James M., Acting Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice 58
Winter, Hon. Ralph K., circuit judge, U.S. Court of Appeals for the Second Circuit 82
Wald, Hon. Patrica M.; Hon. Harry T. Edwards; and Hon. Ruth Bader Ginsburg, circuit judges, U.S. Court of Appeals for the District of Columbia 94
Lively, Hon. Pierce, chief judge, U.S. Court of Appeals for the Sixth Circuit 121
Hruska, Hon. Roman L., of Kutak, Rock & Campbell, Omaha, NE; Hon. Daniel J. Meador, professor of law, University of Virginia; and A. Leo Levin, director of the Federal Judicial Center 133
Sexton, Prof. John, professor of law, New York University 159

ALPHABETICAL LIST AND MATERIAL SUBMITTED

East, Hon. John P.:
  Letters from Chief Justice Warren E. Burger—
    September 13, 1985 15
      Enclosure: "Annual Message on the Administration of Justice," report to the American Bar Association, February 17, 1985 16
    September 19, 1985 31
  Letter from Justice John Paul Stevens, September 24, 1985 32
    Enclosure: Letter to Hon. Robert W. Kastenmeier, chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, October 25, 1983 34
  Letter from Arthur J. Goldberg, former Associate Justice of the U.S. Supreme Court, September 19, 1985 37
    Enclosure: "Managing the Supreme Court's Workload," commentaries by Arthur J. Goldberg, from the Hastings Constitutional Law Quarterly, Spring 1984 38
Edwards, Harry T.:
  Testimony 106
  Prepared statement 108
Ginsburg, Ruth Bader:
  Testimony 113
  Prepared statement 115
Heflin, Hon. Howell:
  Prepared statement of Collins J. Seitz, judge, U.S. Court of Appeals for the Third Circuit 49
  Prepared Statement of John C. Godbold, chief judge, U.S. Court of Appeals for the Eleventh Circuit 51

Page

- Hruska, Roman L.:
  - Testimony 133
  - Prepared statement 137
- Levin, A. Leo:
  - Testimony 144
  - Prepared statement 146
- Lively, Pierce:
  - Testimony 121
  - Prepared statement 126
- Meador, Daniel J.:
  - Testimony 151
  - Prepared statement 154
- Sexton, John:
  - Testimony 159
  - Joint prepared statement of Samuel Estreicher and John Sexton 163
  - "NYU Supreme Court Project," executive summary—A managerial theory of the Supreme Court's responsibilities: an empirical study of the 1982 term 181
- Spears, James M.:
  - Testimony 58
  - Prepared statement 63
- Wald, Patricia M.:
  - Testimony 94
  - Prepared statement 97
- Winter, Ralph K.:
  - Testimony 82
  - Prepared statement 86

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

- Statement by Erwin N. Griswold, of Jones, Day, Reavis & Pogue, attorneys, Washington, DC 229
- "The Inter-Circuit Tribunal," statement by the Association of the Bar of the City of New York, by Robert B. McKay, president, and by the Committee on Federal Courts 237

CORRESPONDENCE

- Letters to Hon. John P. East, chairman, Subcommittee on Courts, from:
  - Dean Bunch, of Ervin, Varn, Jacobs, Odom & Kitchen, attorneys at law, September 25, 1985 244
  - Walter J. Cummings, chief judge of the Seventh Circuit, U.S. Court of Appeals, October 1, 1985 245
  - Wade H. McCree, Jr., Lewis M. Simes professor of law, October 4, 1985 246
    - Enclosure: "To Preserve an Endangered Species," article by Wade H. McCree, Jr., reprinted from the 1983 University of Cincinnati Law Review 247
  - Robert L. Stern, of Mayer, Brown & Platt, October 7, 1985 256
  - Archibald Cox, Harvard Law School, October 17, 1985 261
  - Hon. Edward M. Kennedy, November 4, 1985 262
    - Enclosure: "What To Do With the Supreme Court's Burgeoning Calendars?" by Milton Handler, reprinted from the Cardozo Law Review, winter 1984 263
- Letter to Hon. Patrick J. Leahy, from James L. Oakes, circuit judge of the Second Circuit, U.S. Court of Appeals, October 31, 1985 302

INTERCIRCUIT PANEL OF THE UNITED STATES ACT

WEDNESDAY, OCTOBER 9, 1985

U.S. SENATE,
SUBCOMMITTEE ON COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m. in room 106 of the Dirksen Senate Office Building, Senator John P. East (chairman of the subcommittee) presiding.

Present: Senator Heflin.

Staff present: Steven R. Valentine, administrative assistant to Senator East; David E. Anderson, chief counsel and staff director; James E. Hinish, Jr., general counsel; William G. Short, professional staff member; Melanie L. Oliver, special assistant; Ann Loudermilk, chief clerk; Lee Arevian, staff assistant; Arthur Briskman, minority chief counsel.

Senator EAST. This hearing of the Subcommittee on Courts will please come to order.

This morning we are here for the purpose of a hearing on S. 704, the "Intercircuit Panel of the United States Act." And before making an opening statement of my own, I would like to recognize the distinguished chairman of the Judiciary Committee, who must leave in about 10 minutes, to make a statement on this particular bill.

So we welcome the distinguished Senator Strom Thurmond of South Carolina.

Senator Thurmond.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA; CHAIRMAN, COMMITTEE ON THE JUDICIARY

The CHAIRMAN. Thank you, very much, Mr. Chairman, for your courtesy, and I want to say further, I am very pleased to see you back and in such good health now. We are all happy to have such an able and distinguished Senator back in the Senate.

Mr. Chairman, I am pleased to testify this morning before the Subcommittee on Courts on the need for, and the provisions of S. 704, a bill to establish an intercircuit panel of the U.S. Courts of Appeals.

On March 20, 1985, I introduced this legislation and was joined by Senators Heflin, Dole, Simpson, Laxalt, Hatch, Denton, Specter, McConnell, DeConcini, and Hatfield, as original cosponsors. Senators Cochran and McClure were subsequently added as cosponsors.

Mr. Chairman, this legislation, endorsed by the Chief Justice, as well as other members of the U.S. Supreme Court, is a bipartisan response to the urgent need of the Supreme Court for relief from its ever-increasing workload.

In 1954, there were only 1,500 cases on the docket. At the close of the term that ended in July 1985, there were just over 5,000 cases.

It is simply unrealistic to expect nine judges to handle this drastically increased caseload effectively.

The current proposal is the result of over 12 years of debate and study by scholars and judicial commentators, including the Freund and Rosenberg committees and the Hruska Commission. Similar legislation was introduced in both the 97th and 98th Congresses, and extensive hearings were held.

The Intercircuit Panel Act would create an experimental, 5-year panel to exercise jurisdiction over certain cases referred to it by the Supreme Court. This panel would have no original jurisdiction.

The Supreme Court of the United States would designate nine active, or senior status circuit judges as members of the panel.

The panel would be particularly useful in providing a uniform resolution to cases where there is a conflict on a question of law among the various circuit courts of appeals.

According to statistics compiled by the Supreme Court, conflict cases constitute one-third of the signed opinions of the Court. Of these, statutory interpretation cases consistently compose the largest single group. During the 1984 term, there were 52 conflict cases decided by formal, signed opinions. Forty-two, or 70 percent, involved a question of Federal law. Over the last five terms, the Supreme Court decided an average of 47 conflict cases per term.

These cases could be referred to the intercircuit panel. The Supreme Court, however, would retain the power to overrule or modify any decision of the panel, consistent with its constitutional role as the highest court in the land.

Mr. Chairman, contrary to some reports in the media, this bill would not establish a new court. In fact, if successful, this panel might eliminate any need for a new court, since no additional judgeships are created by this measure, and the panel would utilize existing facilities and staff. This proposal has the added advantage of being cost-effective. Further, the "sunset" provision would end the panel in 5 years, unless expressly extended by Congress.

Mr. Chairman, as we are all aware, we have become an extraordinarily litigious society. Case filings on every level seem to multiply each year and the Supreme Court sits at the top of this incredible pyramid.

The statistics verify that the Supreme Court is faced with a serious volume crunch. This situation deserves our thoughtful attention. Given this dire need, the creation of an intercircuit panel on an experimental basis is a modest, yet important response. I urge my colleagues to support this measure. I hope we can get action on it very quickly. The Supreme Court is pushing very hard to get some relief, and this appears to be one of the finest ways to get relief without inaugurating or establishing a new court.

[A copy of S. 704 follows:]

99TH CONGRESS
1ST SESSION

S. 704

To establish an Intercircuit Panel, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 20 (legislative day, FEBRUARY 18), 1985

Mr. THURMOND (for himself, Mr. HEFLIN, Mr. DOLE, Mr. SIMPSON, Mr. LAXALT, Mr. HATCH, Mr. DENTON, Mr. SPECTER, Mr. MCCONNELL, Mr. DECONCINI, and Mr. HATFIELD) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To establish an Intercircuit Panel, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Intercircuit Panel of the United States Act".

ESTABLISHMENT OF PANEL

SEC. 2. (a) Part I of title 28, United States Code, is amended by inserting after chapter 3 the following new chapter:

"CHAPTER 4—INTERCIRCUIT PANEL OF THE UNITED STATES COURTS OF APPEALS

"Sec.
"61. Establishment and composition of Intercircuit Panel.
"62. Principal office and sessions.
"63. Seal.

"§ 61. Establishment and composition of Intercircuit Panel

"(a)(1) There shall be an Intercircuit Panel of the United States Courts of Appeals that shall be composed of nine judges and four alternate judges designated by the Supreme Court of the United States. Such nine judges shall constitute the Panel. All judges designated to serve on the Panel shall be circuit judges who are in regular active service or who are senior judges.

"(2) For the original designations, the Supreme Court shall designate four judges to serve on the Panel for a period terminating two years after the date of the first referral made pursuant to section 1260(a) of this title, four judges to serve for a period terminating three years after such date, and five judges to serve for a period terminating five years after such date. Thereafter the Supreme Court shall designate judges to serve on the Panel for terms of three years. All terms shall commence on the date of such designation.

"(3) The Chief Justice shall designate the presiding judge of the Panel from among members of the Panel.

"(b) Cases and controversies shall be heard and determined by the Panel.

"(c) No judge shall hear or participate in the determination of any case referred to the Panel in which such judge previously participated as a judge of a court of appeals. In the event of a vacancy on the Panel caused by a judge disqualifying himself under this subsection, or under section 455 of this title, or caused by the absence of any judge designated to sit on the Panel, a judge shall be designated from among the alternate judges to sit on the Panel in accordance with the rules prescribed by the Panel.

"(d) Rules of procedure shall be promulgated by vote of a majority of the full membership of the Intercircuit Panel and such procedures shall be published before any cases are heard by such Panel.

"(e) In the event of the death, resignation, or disability of any judge designated under subsection (a), the Supreme Court shall fill the vacancy in accordance with the provisions of subsection (a). A judge designated to fill such a vacancy shall be designated to serve for the remainder of the period of his predecessor's term.

" § 62. Principal office and sessions

"The principal office of the Intercircuit Panel of the United States Courts of Appeals shall be in the District of

Columbia, but the Panel may hold court at such times and places within the United States as the Panel may fix by rule.

"§ 63. Seal

"The Intercircuit Panel of the United States Courts of Appeals shall have a seal which shall be judicially noticed.".

(b) The analysis of part I of title 28, United States Code, is amended by inserting after the item relating to chapter 3 the following new item:

"4. Intercircuit Panel of the United States Courts of Appeals.... 61.".

OFFICERS AND EMPLOYEES

SEC. 3. (a) Part III of title 28, United States Code, is amended by inserting after chapter 47 the following new chapter:

"CHAPTER 48—INTERCIRCUIT PANEL OF THE UNITED STATES COURTS OF APPEALS

"Sec.
"731. Clerk, employees and facilities.
"732. Marshal and bailiffs.

"§ 731. Clerk, employees and facilities

"The clerk of the Court of Appeals for the Federal Circuit shall perform the duties of clerk of the Intercircuit Panel of the United States Courts of Appeals. Clerical assistance and facilities shall be provided to the Intercircuit Panel by the Court of Appeals for the Federal Circuit and by the Supreme Court in a manner which is mutually agreeable to the Chief Justice of the United States Supreme Court, the presiding judge of the Intercircuit Panel and the Chief Judge of the Court of Appeals for the Federal Circuit.

"§ 732. Marshall and bailiffs

"The Intercircuit Panel of the United States Courts of Appeals may request the services of the marshal of the court of appeals for the judicial district in which the Panel is sitting. The marshal shall attend the Panel at its sessions, take charge of all property of the United States used by the Panel, and perform such other duties as the Panel may direct. The marshal, with the approval of the Panel, may request necessary bailiffs from the court of appeals which such marshal serves. Such bailiffs shall attend the Panel, preserve order, and perform such other necessary duties as the Panel or the marshal may direct.".

(b) The analysis of part III of title 28, United States Code, is amended by inserting immediately after the item relating to chapter 47 of such title the following new item:

"48. Intercircuit Panel of the United States Courts of Appeals.. 731.".

JURISDICTION AND REVIEW

SEC. 4. (a)(1) Chapter 81 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1260. Referral to Intercircuit Panel of the United States Courts of Appeals

"(a) The Supreme Court may refer any case to the Intercircuit Panel of the United States Courts of Appeals, before or after granting or denying certiorari, or before or after noting probable jurisdiction of an appeal. The Supreme Court shall direct the Intercircuit Panel of the United States Courts of Appeals to decide any case so referred which is subject to review by appeal, and the Supreme Court may direct the Panel to decide any other case so referred.

"(b) Cases in the Panel may be reviewed by the Supreme Court in the same manner as provided in section 1254(1) of this title for cases in the courts of appeals generally.".

(2) The analysis of chapter 81 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"1260. Referral to Intercircuit Panel of the United States Courts of Appeals.".

(b)(1) Part IV of title 28, United States Code, is amended by adding immediately after chapter 81 of such title the following new chapter:

"CHAPTER 82—INTERCIRCUIT PANEL OF THE UNITED STATES COURTS OF APPEALS

"Sec.
"1271. Jurisdiction.
"1272. Finality of decisions.

"§ 1271. Jurisdiction

"The Intercircuit Panel of the United States Courts of Appeals shall have jurisdiction of cases referred to the Panel by the Supreme Court.

"§ 1272. Finality of decisions

"(a) The Intercircuit Panel of the United States Courts of Appeals may deny review in any case referred to the Panel by the Supreme Court which is subject to review by writ of certiorari, unless the Panel is directed by the Supreme Court to decide such case.

"(b) Unless modified or overruled by the Supreme Court, decisions of the Intercircuit Panel of the United States Courts of Appeals (other than decisions denying review under subsection (a)) shall be final decisions and shall be binding on all courts of the United States and, with respect to questions arising under the Constitution, laws, or treaties of the United States, on all other courts.".

(2) The analysis of part IV of title 28, United States Code, is amended by inserting immediately after the item relating to chapter 81 of such title the following new item:

"82. Intercircuit Panel of the United States Courts of Appeals.. 1271".

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 5. (a) Section 1913 of title 28, United States Code, is amended to read as follows:

"§ 1913. Courts of appeals; Intercircuit Panel of the United States Courts of Appeals

"The fees and costs to be charged and collected in each court of appeals and in the Intercircuit Panel of the United States Courts of Appeals shall be prescribed from time to time by the Judicial Conference of the United States. Such fees and costs shall be reasonable and, in the case of the courts of appeals, shall be uniform for all such courts.".

(b) The item relating to section 1913 of title 28, United States Code, in the analysis of chapter 123 of such title, is amended to read as follows:

"1913. Courts of appeals; Intercircuit Panel of the United States Courts of Appeals.".

(c) The first paragraph of section 2072 of title 28, United States Code, is amended by inserting after "courts of appeals of the United States" the following: "and of the Intercircuit Panel of the United States Courts of Appeals".

(d) Section 2106 of title 28, United States Code, is amended by inserting immediately after "Supreme Court" the following: ", the Intercircuit Panel of the United States Courts of Appeals,".

REPORTS

SEC. 6. (a) Section 604(d) of title 28, United States Code, is amended—

(1) in paragraph (4) by striking out the period at the end thereof and inserting in lieu thereof "; and"; and

(2) by adding at the end thereof the following:

"(5) lay before Congress annually statistical tables and other information which will accurately reflect the business which has come before the Intercircuit Panel of the United States Courts of Appeals.".

(b) The Intercircuit Panel of the United States Courts of Appeals, in consultation with the Director of the Administrative Office of the United States Courts, shall submit to the Supreme Court, the Judicial Conference of the United States, the President and Congress, not later than four years after the date of the first referral made pursuant to section 1260(a) of title 28, United States Code, as added by this Act, a comprehensive report on the activities of such Panel since the effective date of this Act.

AUTHORIZATION OF APPROPRIATIONS

SEC. 7. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

EFFECTIVE DATE; TERMINATION OF INTERCIRCUIT PANEL

SEC. 8. (a) This Act and the amendments made by this Act shall become effective upon the date of enactment.

(b) Except as provided in subsection (c), this Act and the amendments made by this Act shall cease to be effective upon the final disposition of all appeals pending in the Intercircuit Panel on the date five years after the date of the first referral made pursuant to section 1260(a) of title 28, United States Code, as added by this Act.

(c) Section 1260(a) of title 28, United States Code, as added by section 4, shall cease to be effective on the date five years after the date of the first referral made pursuant to section 1260(a) of title 28, United States Code, as added by this Act.

○

Senator EAST. Thank you, Senator Thurmond.

The CHAIRMAN. Thank you very much.

Senator EAST. We appreciate your coming. Your testimony, of course, will be very valuable to us.

The CHAIRMAN. Thank you very much, Mr. Chairman.

OPENING STATEMENT OF HON. JOHN P. EAST, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator EAST. This morning we also have with us the distinguished Senator Howell Heflin of Alabama. We are delighted to have you, Senator Heflin, and appreciate your making the effort to be with us.

I would like to make a few general observations, if I might, on this measure, and then entertain any comment that Senator Heflin might have. Then we can move promptly to our witnesses.

I would like to stress that we want to move along as quickly as we can. Naturally, that is always "easier said than done." We would like for witnesses to confine their remarks to about 10 minutes, and the panels, we would appreciate confining their remarks to about a 20-minute span.

I shall try to be brief this morning and I would encourage brevity to the extent that it is at all practical, so that we might expedite this matter.

This subcommittee has dealt in past Congresses with the question of whether to establish a body like the proposed intercircuit panel. Under S. 704, the panel would exist between the Supreme Court and the circuit courts of appeals for the purpose of resolving "any case" that might be referred to it by the Supreme Court. But it is assumed, of course, that the primary emphasis of the panel would be upon resolving conflicts arising at the circuit level.

There would be 13 judges on this court. Nine would be sitting judges, and four alternates. They would be designated by the Supreme Court from among current circuit court judges, or retired circuit court judges.

And as Senator Thurmond notes, there is a 5-year "sunset" provision on this act, so that at the end of that time it could be reviewed by the Congress.

There are, of course, as we shall see this morning, conflicting points of view on the merits of the proposal to establish the intercircuit panel.

Chief Justice Burger has been the most outspoken proponent in terms of his leadership on the Court. He speaks, as Senator Thurmond was noting, of the "avalanche of cases" currently on the Court's docket.

In 1953, there were fewer than 1,500 cases. In 1985, there are nearly 5,000. And this glut of cases is impairing the capacity of the Court to do its job. It is reflecting adversely on the entire judicial system, and in order to expedite this flow of cases, Chief Justice Burger is recommending and has pushed strenuously for creation of the intercircuit panel of the United States.

The principal opponent of this measure on the Court is Associate Justice John Paul Stevens. I might note briefly, a few comments he has made on it, simply to give a little idea of the flavor of the differing points of view. In his letter to me, of September 24, he states: "I am convinced that the Court is currently able to address the questions that merit our attention."

Justice Stevens says that creating the intercircuit panel would merely "double the capacity of the Court." That is his phrase, "double the capacity of the Court," and he does not look upon it as slowing down the avalanche of cases but probably exacerbating it.

Justice Stevens notes that the Supreme Court would have to decide which cases to refer to the panel, then it would have to review its rulings, and that in and of itself would be very time consuming. In addition, says Justice Stevens, the Court would probably be tempted to take on additional cases, rather than fewer, to make up for those it delegated to the intercircuit panel.

This morning we have with us—we will hear from him in due course—one of the principal academic critics of this measure, Prof. John Sexton of the New York University Law School. Professor Sexton and his NYU law school colleague, Professor Estreicher, have conducted an extensive study of the Supreme Court's workload problem.

They contend, among other things, that this problem is primarily self-inflicted, and that the Court ought to reserve its time and talents for resolving fundamental clashes within the constitutional system, between the Federal Government and State governments, between the three branches of the Federal Government, or, in terms of resolving conflicts among or between the circuit courts of appeals. They note in the 1982–83 term, as they analyze it, in any case, that one-quarter of the cases the Supreme Court decided, and I quote, "did not involve nationally significant issues."

Sexton and Estreicher argue that the need is for a better managed docket; that the conception of the court, as the "Court of last resort," is simply untenable in the real world of the administration of justice, and that the Court needs to put its emphasis upon a better managed docket, rather than trying to increase its institutional support through creation of the intercircuit panel.

That, then, is simply a very quick summary of conflicting points of view, and we hope to bring this out, of course, in greater depth as the witnesses present their testimony here this morning.

At this point, I would like to ask unanimous consent that two letters from Chief Justice Burger, and one from Associate Justice John Paul Stevens, as well accompanying material, be made a part of this record. If there is no objection, it is so ordered. Both of these distinguished gentlemen were invited to testify, but were unable to do so because of the press of the Court's business. I would also ask that my prepared opening statement be made a part of the permanent record. We have also solicited letters commenting on S. 704 from former Solicitor Generals, and I would ask that the record might be kept open for purposes of including those materials. Finally, we also invited former Associate Justice Arthur Goldberg to testify this morning. He was unable to do so, but he has submitted material for the record as well. Without objection, I will so order.

[The following material was submitted for the record:]

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

September 13, 1985

Dear Senator East:

I have your letter of September 11th inviting me to appear before your Subcommittee on Courts with hearings on S. 704. I find it will be impossible for me to accept this invitation once the 1985 Term of Court opens. In terms of oral arguments, the Term begins on October 7, but for many years we have had to reserve the week preceeding oral argument for conferences to review the filings which have accumulated since June.

My Annual Report to the American Bar Association on February 17, 1985 expresses my views on this subject, and you are entirely free to place this in the record if you wish.

Cordially,

Warren E. Burger

Honorable John P. East
United States Senate
Washington, D.C. 20510

ANNUAL MESSAGE
ON
THE ADMINISTRATION OF JUSTICE

From

WARREN E. BURGER
CHIEF JUSTICE OF THE UNITED STATES

at the Midyear Meeting of the
American Bar Association

Detroit, Michigan

February 17, 1985

In the life of every institution changes sometimes occur so gradually and subtly that they elude the eyes of the casual observer and often elude even the attention of those directly involved. In this sixteenth Annual Report to the Association, I will discuss with you the steady growth of case filings and the increase of signed opinions of the Supreme Court from Chief Justice Warren's first Term to my first Term, and to the present. This inexorable growth is the kind of gradual and subtle change that has not been fully understood by our profession—and perhaps not fully grasped by the Judiciary itself.

Changes in the structure of the judicial system should be approached with care and caution and made only after deliberation and debate. However, this problem has now been under consideration for more than a dozen years; a number of alternatives have been developed; and the real question now is whether we have debated and discussed it long enough and the time has come to act.

In 1971, a Study Group on the Case Load of the Supreme Court was appointed under the auspices of the Federal Judicial Center. It came to be known as the Freund Committee[1] because it was chaired by a distinguished lawyer and scholar, Professor Paul Freund of the Harvard Law School. Professor Freund had been a practitioner before the Court and a notable scholar of the Court's work for many years. In an earlier day, he had served as Law Clerk to Justice Brandeis and he understood the mechanisms, the internal workings, of the Court, from his tenure as a Law Clerk as well as from the period when he appeared before the Court as an assistant solicitor general.

The report of the Freund Committee in 1972 urged that an additional court be added to the Federal system—a permanent appellate tribunal between the Courts of Appeals and the Supreme Court. Our profession, being accustomed to rely on precedent—some might say addicted to precedent—had a variety of reactions. Some were favorable, some were opposed, and some were noncommittal. Members of the Supreme Court were of divided views. Judges, no less than others, are sometimes slow to accept change or to delegate power.

---

[1] Chairman: Paul A. Freund, Alexander M. Bickel, Peter D. Ehrenhaft, Dean Russell D. Niles, Bernard G. Segal, Robert L. Stern, and Charles Alan Wright.

Those of us who were concerned about this problem had no illusions that there would be speedy action, but we knew the discussion and the debate had to begin sometime and the Freund Report with its recommendations was a good beginning.

In my Annual Report to you in St. Louis, I urged that the Congress create a Judiciary Council to observe and report from time to time on a broad range of problems of the judiciary.[2] Congress created the Commission on Revision of the Federal Court Appellate System, chaired by Senator Roman Hruska of Nebraska. The members were appointed by the Congress, by the President, and by me,[3] and that Commission came to almost the same conclusion as that reached by the Freund Committee, *i.e.*, that an appellate tribunal between the Courts of Appeals and the Supreme Court was imperatively needed. This report met some of the objections raised to the Freund proposal.

Independent of either of these two studies, yet another fully independent body that reviewed the appellate caseloads of the state and federal courts was chaired by Professor Maurice Rosenberg of Columbia Law School. That Committee came to similar conclusions with respect to the need for a "new nationwide or multicircuit" tribunal with jurisdiction fixed broadly by Congress and functions and procedures determined by the Supreme Court.

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[2] Burger, "State of the Federal Judiciary," Speech to the American Bar Association, St. Louis, Missouri (Aug. 10, 1970).

[3] Chairman: Senator Roman L. Hruska, Congressman Jack Brooks, Senator Quentin N. Burdick, Congressman Emanuel Celler, Dean Roger C. Cramton, Congressman Walter Flowers, Senator Hiram L. Fong, Congressman Edward Hutchinson, Judge J. Edward Lumbard, Francis R. Kirkham, Senator John L. McClellan, Judge Roger Robb, Bernard G. Segal, Judge Alfred T. Sulmonetti, Professor Herbert Wechsler, and Congressman Charles E. Wiggins.

What has happened since those reports? Congress acted on some recommendations, such as substantial elimination of three judge District Courts in 1976. In 1981 and 1983, Congressman Kastenmeier and others introduced a bill to create an temporary experimental Intercircuit Tribunal.

Senator Heflin, former Chief Justice of Alabama, introduced bills for a National Court of Appeals in 1981 and 1982. An Intercircuit Tribunal bill was introduced in 1983 by Senators Dole, Heflin, and Thurmond. Hearings were held last year by the Kastenmeier and Dole Subcommittees, both of which reported a bill out to their full Judiciary Committees in the last Congress.

What caused all three of these independent commissions, made up of highly experienced and distinguished members of our profession, to reach substantially the same conclusion? No one can look at the membership of those bodies and fail to conclude that the people on those committees represent the best of our profession.

Let me give you some significant figures which are important factors. Chief Justice Warren took office in October, 1953. There were 1,463 cases on the docket. In the Term completed last July, there were 5,100 cases on the docket.

From time to time some superficial observers brush off the number of filings, saying it takes only a "few minutes" to deal with the vast majority of them because they are frivolous. As with many sweeping generalities, there is a grain of truth in it but it is a very small grain. Many are frivolous, but it takes more than a "few minutes" to determine that. I wonder how many lawyers would be happy to think their petitions for certiorari were disposed of in a "few minutes?" People who study this problem in the library, rather than in the real world where hard decisions are made by judges, seem to think there is very little difference in dealing with

1,500 cases or 5,000. Perhaps they do not know that every filing is passed on by every Justice.

The number of signed opinions is the best single measure of the workload of the Supreme Court. In 1954, when Chief Justice Warren completed his first Term, there were 65 signed opinions by the Court. In the current Term, 65 opinions were already assigned to Justices for writing by December 15, 1984—just over two months after the Term opened. Ponder on that for a moment: if the present Justices had stopped hearing cases in December, 1984, they would have had as much work as the nine Justices had in the entire 1953 Term.

The next Term—1954—the Court had 78 signed opinions and the number has been rising steadily ever since. When I completed my first Term in 1970, there were 88 signed opinions of the Court. In the two most recent Terms, there were more than 150 signed opinions each Term. Years ago we passed any sensible limit on how much the Supreme Court should be asked to do.

One hundred years ago when Grover Cleveland was elected President, there were 55 United States District Judges, 9 United States Circuit Judges, and 39 State Supreme Courts. All were deciding cases subject to possible review by the Supreme Court. At that time, there were nine Supreme Court Justices sitting in Washington. Today, Ronald Reagan is President. There are 758 District Judges—758 against 55—and 226 Circuit Judges—226 against 9—authorized.[4] Those judges are daily deciding cases potentially subject to Supreme Court review.

There are still nine Justices on the Supreme Court.

Why is it so difficult to grasp the reality that just as we need more police and more courts to deal with automobile traffic than we did 75 years ago when there were very few automobiles, we need something more to deal with the avalanche of cases coming to the Supreme Court. The same question can be put as to the increase in the complexity of our social and economic structure—and the enormous increase in crime.

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[4] There are presently 576 District Court Judgeships, 182 active Senior District Judges, 168 Circuit Court Judgeships, and 58 active Senior Circuit Judges.

It is elementary that when the "input"—that word of the computer age—into any system is increased—when there are more "customers"—one of two things must happen:

a) The mechanisms to deal with the increased flow must be adjusted, or

b) The "output" mechanism must be enlarged or made more efficient.

We have already done everything practicable to meet these problems. Courts of Appeals and some of the larger District Courts now have trained court administrators to allow more efficient use of judicial time. We now use modern word processing equipment and computerized record keeping. More law clerks, secretaries, and staff have been added. A whole structure of Magistrate's courts has been added. The courts have begun to impose sanctions on attorneys who bring frivolous cases or abuse judicial processes. We will see more of this.

Everywhere throughout the system there have been great improvements in how cases are processed. It is ironic that the very efficiencies that have been achieved in District and Circuit Courts simply bring more cases sooner to the Supreme Court. Today the judges of the Federal system at every level are disposing of more cases per judge each year than at any other time in history.[5]

The present proposal is a modification of the Freund, Hruska, and Rosenberg Committee proposals. The debate on this subject over a total of a dozen years has been valuable and led to improvements over the original proposals. Now, and this is particularly important, rather than a permanent intermediate court of the kind recommended by those studies—a National Court of Appeals—I propose we create a temporary and experimental panel—an Intercircuit Panel—made up of judges of the Courts of Appeals, including, of course, Senior Circuit Judges. We can experiment for up to five years by assigning to that panel the task of resolving conflicts in the holdings of the several Circuits. This would mean that Judges from the level where the conflicts arise would be charged with the duty to resolve such conflicts.

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[5] Each District Court judgeship terminated an average of 517 cases in 1984; each Court of Appeals panel (one panel per three judgeships) terminated an average of 709 cases in 1984.

Conflicts at the Court of Appeals level are largely *intercircuit* conflicts; with one Circuit now having 28 Judges on the Court of Appeals and other Circuits a dozen or so, *intracircuit* conflicts are arising, *i.e.*, conflicts within the Circuit itself. *Intracircuit* conflicts are theoretically, but not invariably, resolved by having the case reviewed *en banc*. What I now propose amounts to little more than that we have a national *en banc* panel of nine judges. It is just that simple.

And since this would be a process of resolving conflicts among the circuits, the logical source for these decision makers is, as I suggested earlier, to draw upon the judges of the level where the conflicts originate. The Supreme Court could reserve certiorari jurisdiction.

The Intercircuit Panel would be selected by the Supreme Court from among the 226 Circuit Judges. One judge would be drawn from each of the 13 Courts of Appeals. This would permit a regular panel of nine judges with four in reserve. The nine member panel would sit for two sessions of two weeks each per year. Cases would continue to come from the Courts of Appeals to the Supreme Court, but the Supreme Court would have the option to refer circuit conflict and probably interpretation of federal statutes to this Intercircuit Panel—this national *en banc* body.

In each of the past three Terms of the Supreme Court, we heard and decided an average of 48 cases involving circuit conflicts. Last Term there were 55 conflict cases decided. These cases could be referred to the Intercircuit Panel unless—because of the importance or urgency of the question—the Court elected to resolve the conflict without reference to the Panel. Every year we decline to hear numerous other circuit conflicts if we see them as "tolerable conflicts." Probably some of the lawyers involved do not think the conflict is "tolerable." Increasingly, one or more Justices file a brief dissent from denial of certiorari. Absent the need for immediate action by the Supreme Court, such cases could be referred to this special Panel. I would risk a prediction that few of those cases would be granted further review by the Supreme Court; but that remains to be seen and that is why we should experiment.

This special experimental panel will have a five-year "sunset" provision. Within that time, we would be able to determine whether the plan works; of course, if during that time we see that the experiment is not effective, it could be terminated simply by the Supreme Court's decision not to send any additional cases to the Panel.

The uniqueness of this proposal is that there will be no new bureaucracy seeking to perpetuate itself and perpetuate staff positions. And in a day when the ominous shadow of annual and past deficits hangs over the country and over each one of us, I am comforted somewhat in pressing this position by saying that it will not cost the taxpayers any significant additional money except for the relatively nominal factor of the travel expense of the nine judges coming to Washington twice a year. This new Panel would not require a new courthouse; it would not need a new courtroom; it would not need a permanent court clerk. The Court of Appeals for the Federal Circuit has tendered its courtroom. Existing staffs of the Court of Appeals for the Federal Circuit or the Supreme Court can absorb the extra duty of preparing the docket.

There is, of course, nothing new or drastic or unusual about creating special panels, drawn from the roster of Federal Judges presently in office. In the past 20 years Congress has created many special, temporary panels. During my 16 year tenure, Congress created one for the selection of a so-called "special prosecutor," another for the Temporary Emergency Court of Appeals, and two Foreign Intelligence Surveillance Courts; the Multi-District Litigation Panel was established earlier. Members of these panels are designated from among the present Federal Judges; no new permanent court structure was created. More than 60 judges have been designated to these panels by me since 1969 under authority granted by Congress. I have heard no complaint about the personnel or the performance of those special panels.[6]

Since these proposals were first advanced they have been refined, but there has been considerable misinformation on the subject. Some witnesses before Congressional committees supported this experimental plan; some were opposed. Much of the opposition was based on misinformation or outdated information. For example, one witness argued that the shifting members of the Intercircuit Panel would create conflicts within the Tribunal itself. The present proposal is for a nine-judge panel that will sit on all referred cases.[7] Another witness said that conferring on such a court the authority to hear cases coming from state courts is unprecedented and possibly unconstitutional. This panel will not deal with state court cases. Another witness said there would be "mind-boggling" administrative problems of staff support for the Panel. That is simply not correct; the administrative problems will be miniscule.

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[6] The Supreme Court has long delegated authority to Special Masters to spare it much of the time required to decide suits between the States or between States and the Federal Government; the Court then acts on findings and conclusions of the Special Masters.

[7] When any member of the Panel is unavailable or ineligible one of the four "reserve judges" would be drawn by lot.

Another criticism—the most surprising one—was that this Panel would not really help the Supreme Court very much. That, too, has no basis. If the Intercircuit Panel took thirty to fifty cases off of the Supreme Court calendar, that would obviously be of great help to the Supreme Court. Independent studies have demonstrated this.[8] What it could do is restore nearly the kind of calendar that Professor Henry Hart, and Justice Frankfurter, postulated many years ago as the maximum caseload that should be carried by the Supreme Court. Hart and Frankfurter based their conclusions on a limit they believed would maintain the quality that is called for by the kinds of cases and the basic function of the Court—the high quality the country has a right to expect from the Court.

In the 1958 Term, when the Court was dealing with fewer than 100 full signed opinions, Professor Hart, in his Annual Review of the Supreme Court's work in the *Harvard Law Review* stated flatly: "The number of cases which the Supreme Court tries to decide by full opinion, far from being increased, ought to be materially decreased"[9]—"materially decreased" from 100!

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[8] A study by the Department of Justice supported the Intercircuit Panel. It concluded, "There should be an immediate 25–30% decrease in the Court's argument calendar. The proposal may induce an increase in the number of certiorari petitions, but this is conjectural and would in any event still produce a substantial net gain."

[9] Henry J. Hart, Jr., Foreword: The Time Chart of the Justices, 73 *Harv. L. Rev.* 84, 99 (1959).

At about the same time, Professor Hart's former colleague Justice Frankfurter, by then sitting on the Supreme Court, said

[T]he judgments of this Court are collective judgments. Such judgments presuppose ample time and freshness of mind for private study and reflection in preparation for discussion at Conference. Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions. It is therefore imperative that the docket of the Court be kept down so that

Another objection for this temporary panel is that it would be an undue burden on the Circuit Judges. Let us take a look at that. Many Courts of Appeals panels—with some 15-minute argument limits—hear more than 20 cases in a week. If we drew these nine Circuit Judges into Washington—some of them Senior Judges—they could easily hear all of the cases that are likely to be assigned to them in two, two-week sittings each year.

I will not characterize the argument that this proposal will place an "excessive" load on the Circuit Judges. I will leave that to you to decide whether it would be an "undue burden" to draw *nine* Judges—including Senior Judges—out of the *226* available Circuit Judges, and bring them to Washington for two brief sittings a year.

There is another value to this panel. If all circuit conflicts are resolved promptly the workload of the other federal courts could well be reduced. At the present time, there are conflicts on federal law that are litigated and relitigated in the Districts and Circuits. And even when there is no conflict, there are national issues that ought to be resolved promptly. For example, there have been seven Court of Appeals decisions and 20 District Court decisions on the issue of whether the United States Post Office is immune from state garnishment proceedings.[10] This is a kind of issue that should be settled promptly and with finality without waiting for a conflict. The Panel could well spare many litigants and courts much litigation. However, the primary function of the Panel would be settling conflicts.

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its volume does not preclude wise adjudication. *Dick* v. *New York Life Ins. Co.*, 359 U.S 437, 458–59 (1959) (Frankfurter, J., dissenting).

In the year Justice Frankfurter spoke there were 96 full signed opinions of the Court.

[10] Reported in A. Leo Levin & Susan M. Leeson, Issue Preclusion Against The United States Government, 70 *Iowa L. Rev.* 113, 128–29 (1984).

It does not take much study to see the vast changes in the content of court calendars in just the last ten years. Many are types of cases never before dealt with by any courts at any time. This is in part at least a product of citizen groups actively pressing for new legislation. And who is to say that Congress should not be legislating or citizens should not press for clean air, clean water, better working conditions, greater equality, and elimination of discrimination? Legislation in these areas and in dozens of other categories has increased the work of the District Courts, the Courts of Appeals, and the Supreme Court.

More than 100 statutes enlarging Federal Court jurisdiction have been passed since I have been in office. Judges of District Courts and Courts of Appeals have multiplied. Only the Supreme Court has received no relief. Section 1983 actions alone have accounted for an enormous additional load on all of the courts. Prisoner petitions have done the same. When we double the prison population in ten years from 230,000 to 460,000, we should not be surprised that prisoner petitions have increased. In the current issue of the *ABA Journal*, David Stewart makes these points with great clarity:

> [F]rom 1960 to 1983 civil cases filed in the U. S. district courts increased by about 300 percent, from about 60,000 to 240,000. Over the same period the number of federal appellate decisions increased by more than 600 percent, from 3,713 to 28,660.
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> The major difference between the Supreme Court's caseload and that of the lower courts, however, is that the lower courts now have more judges than they used to, while there are still only nine Supreme Court justices to screen four times as many cases.[11]

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[11] David O. Stewart, An Inside Peek at How the Court Picks Its Cases, 71 *A. B. A. J.* 110 (Feb., 1985).

And, I might add, nine Justices now write full Court opinions in up to twice as many cases as in 1953. Any notion that the Court's problem is a self-inflicted wound simply "will not wash."

On the lighter side, at one Judicial Conference, a Circuit Judge came up to me and inquired how we were getting along with this "caseload problem." I gave him a brief response, and he said, "I want to tell you I am completely, wholeheartedly, 100 percent for these proposals, but my wife—she is not." I knew I was being baited to ask why, and of course I did.

His answer was about like this. "My wife is active in volunteer hospital work, church work, and the bridge club. People ask her, 'What does your husband do,' and she answers, 'My husband is a Circuit Judge.' And she always straightens up when she says that. So the questioner may say, 'Is that like Judge Jones or Judge Butler?'—some local judges who may be justices of the peace or municipal judges. And my wife answers a firm, 'No. My husband is on the *second* highest court in the country.' And, by George, Chief, she does not want to say I'm on the *third* highest!"

Now, we have even taken care of this lady's concerns. Courts of Appeals will, of course, always be "Number Two." They will continue to be final, as they always have been, in 97 to 98% of their cases. The Intercircuit Panel can remain in the same category as the other special panels created by Congress in recent years using designated judges. The Judges of the Intercircuit Panel will be Circuit Judges on special assignment. For all this lady knows, her husband may be on the new Panel.

Will this plan work? There, I must be completely candid. I do not know. No one can really know with any certainty. That is why we need to experiment for a few years. If we find the Panel works, it can be continued as long as it is needed. But, if after two or three years, we conclude that it is not helping, we can abandon it. In any event the statute would have a five year "sunset" provision. Until someone comes along with a better idea, I submit that this experiment is worth trying.

APPENDIX TO 1985 ANNUAL REPORT TO THE AMERICAN BAR ASSOCIATION

FEBRUARY 17, 1985

SUPREME COURT OF THE UNITED STATES

NUMBER OF SIGNED OPINIONS AND CASES ON THE DOCKET PER TERM

YEAR	OPINIONS	CASES ON DOCKET
1950	91	1335
1951	83	1368
1952	104	1437
1953	65	1463
1954	78	1566
1955	82	1856
1956	100	2052
1957	104	2008
1958	98	2062
1959	96	2178
1960	109	2313
1961	84	2585
1962	110	2824
1963	111	2779
1964	101	2662
1965	97	3284
1966	100	3356
1967	110	3586
1968	99	3918
1969	88	4202
1970	106	4212
1971	129	4533
1972	140	4640
1973	140	5079
1974	123	4668
1975	135	4761
1976	126	4731
1977	129	4704
1978	130	4731
1979	130	4781
1980	122	5144
1981	141	5311
1982	151	5079
1983	151	5100

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

September 19, 1985

Dear Senator East:

Supplementing my recent letter to you, these points may be of interest:

The only two objections I have heard to S. 704 are:

(a) That it will not help the Supreme Court

(b) That it will be an undue burden on the Courts of Appeals.

First, for three years past, the Supreme Court argument calendar averaged 46 cases involving circuit conflicts, representing nearly 1/3 of the cases disposed of with full signed opinions. If we could reduce our arguments by 1/3, it would be an enormous aid to the Court. It would enable us to devote more time on the 100 or more remaining argued cases and would allow us to take a few more cases denied review partly because of our finite full argument capacity.

Second, we would bring nine Federal Judges to Washington (or Chicago or Denver) for two sessions of five days each. This would undoubtedly include Senior Judges. Clearly this would not be a significant burden on Courts of Appeals. Courts of Appeals hear as many as 20 cases a week and the "burden" on the nine judges assigned to this Experimental Panel would in no real sense be undue.

The only cost of this pilot program would be the travel expenses of the nine judges. The present staffs of the Judiciary could handle all clerical functions.

Cordially,

Warren E. Burger

Honorable John P. East
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

September 24, 1985

The Honorable John P. East
Chairman, Subcommittee on Courts
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your invitation to express my views on S. 704, the "Intercircuit Panel of the United States Act." In view of the fact that the Court has conferences scheduled during the week of September 30, 1985, I will not be able to appear before the Subcommittee. I can, however, briefly summarize my reasons for opposing the enactment of S. 704, which I should emphasize are my own and are not necessarily shared by other members of the Court.

As I understand it, S. 704 would authorize the Supreme Court of the United States to create a new federal court, to determine the docket of that court by referring any of our own cases to the new court, to select the judges of the new court from among current circuit judges, and to review the work product of that court. In my opinion, the basic policy question raised by S. 704 does not concern the Court's workload, but rather is related to the supposed need to increase the capacity of this Court to render decisions that are binding on all courts in the nation.

It is often assumed that the process of referring some of our cases to a new court would leave our Court with fewer cases to decide. In my judgment, the assumption is incorrect. Unless we were to refer categories of certiorari petitions--perhaps all petitions seeking review of state court judgments, all income tax cases, or all petitions filed by prison inmates, as possible examples--there would be no reduction in the work involved in reviewing certiorari petitions. Nor do I believe that the reference of individual cases to the new court for argument and decision on the merits would reduce the number of cases that we would elect to hear and decide. In view of the fact that the bulk of our jurisdiction is discretionary, the number of cases that we review on the merits is already a matter that is within our control. The cases that we would refer to the "Junior Supreme Court" established by S. 704 would almost certainly be replaced by other cases that we presently decline to review; moreover, some referred cases would return to us after having been decided by the new appellate court. S. 704 would not reduce this Court's workload.

It is, however, true that S. 704 would significantly increase the power of the Supreme Court of the United States. The power to create a panel of nine active judges to decide any case referred to it by this Court should almost double our decision-making capacity. Instead of deciding about one hundred and fifty cases per year, this Court, together with its adjunct, might decide as many as three hundred cases annually. In my opinion, the need for that additional capacity, and thus, the need for the new court proposed by S. 704, has not been demonstrated. I am convinced that the Court is currently able to address the questions that merit our attention--including those on which the Courts of Appeals have rendered conflicting decisions.

If there were a substantial basis for believing that the Supreme Court is not deciding enough cases of national importance, I believe that the pressure for the creation of a new federal court with nationwide jurisdiction would be evidenced by repeated expressions emanating from judges at the trial and intermediate appellate level, from lawyers, or from the public at large. I am not aware of any such support for the creation of a "Junior Supreme Court," even though one might expect that support should come from the groups supposedly disadvantaged by this Court's inability to decide cases rather than from the Court itself.

Finally, may I suggest that your Subcommittee should give great weight to the views of the circuit judges of the United States Courts of Appeals, upon whom the honor--and burden--of serving on the Intercircuit Panel would fall. Because many circuit judges are persuaded that the new tribunal would have an adverse, rather than favorable, impact on the judicial system, I believe it would be unwise to enact S. 704 without ascertaining whether it is supported by the Judicial Conference of the United States.

I enclose for your information a copy of a letter I sent to Representative Kastenmeier regarding a bill which, like S. 704, would have created an Intercircuit Tribunal. Although the letter is nearly two years old, I am generally of the same view today.

Respectfully,

John Paul Stevens

Enclosure

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 25, 1983

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil Liberties
and the Administration of Justice
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

In your letter of August 4, 1983, addressed to the Chief Justice, you invite Members of the Court to comment on H.R. 1970. I am pleased to respond to your inquiry, but must make it perfectly clear that I speak only for myself.

You ask whether the passage of H.R. 1970, or a similar bill to create an Intercircuit Tribunal "with jurisdiction over any case referred to it by the Supreme Court" is a "good idea." The idea certainly has enough merit to warrant serious study, and it has the additional virtue of making a constructive contribution to the ongoing dialogue on an important subject, but I am not persuaded that the bill should be passed. My opinion is based on four premises which I shall discuss separately.

First, the primary function that the new court would perform would be to increase the capacity of the federal judiciary to make decisions that are binding throughout the Nation. In my opinion the need for this additional capacity has not been demonstrated.

The proponents of the proposed new court are correct in stating that there are *some* cases in which this Court denies review but which would be referred to another national tribunal if it were available. Neither the number, nor the character, of those cases, however, justifies the major step of establishing a new court. On the list of approximately one thousand cases that we reviewed at our recent September conference, there were perhaps three or four in which we denied certiorari but which might have been referred to the proposed Intercircuit Tribunal. The cases I have in mind are: *Pressroom Union-Printers League v. Continental Assurance Co.*, 700 F.2d 889 (CA2), cert. denied October 3, 1983 (No. 83-10); *General Electric Co.* v. *S.S. Nancy Lykes*, 706 F.2d 80 (CA2), cert. denied October 3, 1983 (No. 83-94); and *United States* v. *Bice-Bey*, 701 F.2d 1086 (CA4), cert. denied October 3, 1983 (No. 82-6836). Even if there were a few more good candidates for referral, I would remain persuaded that the interest in having fifteen or twenty such cases decided by a national tribunal each year does not justify the rather drastic step of creating a new intermediate federal court. I should add that I do not believe that any of the cases on the summer list that we accepted for review would have been referred to the proposed new Tribunal if it were in existence.

Second, the new court would do nothing to alleviate the workload of this Court, and would increase the burdens of our already over-worked Courts of Appeals.

The proponents of the new court seem to assume that this Court would reduce its docket of argued cases by a number equal to the number of cases that are granted because of a conflict between different circuits. This is not true. Most of the conflict cases that the Court reviews present questions that the Court would probably decide to review even if a referral court were available. Many of them would probably not be referred at all; others might well be reviewed by this Court after decision by the referral court. Our net gain would only involve the very few cases that are of the character of the three that I identified above.

The increased burden on the Courts of Appeals is difficult to estimate, but the new legislation would definitely have some adverse impact. Temporary assignment of two judges in Washington will have some disrupting effect on the Courts of Appeals' schedules and would create an undesirable disparity in the ability of the judges to share their workload equally. The process of selecting the candidates for national service may create internal difficulties, regardless of whether the new task is regarded as an honor or as a burdensome duty. The psychological effect of changing the status of all circuit judges from the second to the third rank in the federal system should not be overlooked; although outsiders tend to minimize the significance of intangible factors such as one's status in the profession, I can assure you that such factors are not unimportant for judges who are being paid far less than the true value of their services. Finally, the entire docket of the new court would constitute a net addition to the present workload of the circuit judges.

Third, the proposed bill would create a more elaborate structure with broader jurisdiction than is either necessary or appropriate. The Tribunal's proposed jurisdiction extends to the review of judgments of the state supreme courts. It is true that this Court has recently decided to construe its jurisdiction over state court judgments more expansively than at any time in our Nation's history (see my dissenting opinion in Michigan v. Long, No. 82-256, decided July 6, 1983), but I do not believe that an intermediate federal court should be given the authority to exercise direct appellate jurisdiction over state courts. Indeed, this Court could alleviate some of its own workload problems if it were less active in reviewing state court judgments that have little or no significance for anyone outside the State in which the case arose. See, e.g., my separate opinions in California v. Ramos, No. 81-1893, decided July 6, 1983; City of Revere v. Massachusetts General Hospital, No. 82-37, decided June 27, 1983; Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 479; [illegible] v. Alaska, [illegible] U.S. [illegible], [illegible].

Fourth, less drastic and more effective solutions to the problem perceived by the proponents of the new court are available. Judge Clifford Wallace of the Ninth Circuit has made a proposal that would avoid most of the difficulties associated with the intercircuit tribunal. In a perceptive article in the California Law Review (71 Cal. L. Rev. 913, [illegible]), and again at the American Bar Association Convention in Atlanta this summer, he suggested that this Court might be given the authority to refer conflict resolution cases to an existing court of appeals for en banc decision on a random or rotating basis, with a provision that such decisions have nationwide precedential effect unless modified by this Court. One of the virtues of Judge Wallace's proposal is that it would enable us to find out how many cases really need referral treatment and whether the referral would avoid or merely postpone review in this Court before we make an investment in the creation of new judicial machinery.

A second less drastic method of furthering the interest in national uniformity might be for the Congress to create a standing committee or commission patterned after the Law Revision Commissions that exist in many States to make changes in the law to correct deficiencies that are identified by litigated cases. As you know, many statutory conflicts involve issues that have little or no political significance in the partisan sense. Now that we are no longer confronted with claims of conflict in patent tax cases, the [illegible] seem to provide the principal source of conflicts. On issues of this kind, the Congress is capable of resolving conflicts more efficiently and more decisively than we can. Moreover, apart from the conflicts area, such a commission could identify certain problem areas—such as the failure to [illegible] preclude a private remedy to enforce a new statutory scheme, or the absence of any federal statute of limitations for civil rights litigation—before they produce a series of conflicting court decisions.

My response is longer than I had intended, but I want you to know that I am grateful for your invitation to comment on this important subject and see no reason why you should not share these views with your colleagues to the extent you deem it appropriate to do so.

Respectfully yours,

ARTHUR J. GOLDBERG

September 19, 1985

The Honorable John P. East
The United States Senate
Washington, D. C. 20510

Dear Senator East:

I thank you very much for your cordial invitation to appear before the Subcommittee on Courts to express my views on S-704.

I regret very much that I must decline your invitation because of a serious health problem involving my wife.

However, I have written on this subject and am enclosing an article which expresses my point of view and which was published in the Hastings Constitutional Law Quarterly. I shall be very glad to have you introduce this article in the record of your hearing.

Sincerely yours,

Arthur J. Goldberg

Arthur J. Goldberg

Enclosure

COMMENTARIES

Managing the Supreme Court's Workload

By Arthur J. Goldberg[*]

The controversy over the establishment of a new federal appellate court to reduce the Supreme Court's workload continues unabated. The original proposal to create such a court, first advanced in the Freund Report,[1] has been modified considerably. Instead of a national appellate court with specially appointed judges who would screen and decide certiorari petitions, it has been proposed by Chief Justice Warren E. Burger that there be a five year experiment with a national appellate court of limited powers and sitting circuit judges.[2]

In a 1976 article in the *Hastings Constitutional Law Quarterly*,[3] I wrote in opposition to the creation of a National Court of Appeals either in the form proposed by the Freund Report or as recommended by the Hruska Commission,[4] which was appointed by Congress to consider the subject. The basis for my opposition was that a delegation of the exercise of the Supreme Court's jurisdiction would create, in effect, two Supreme Courts in violation of the declaration in Article III of the Constitution that there be but "one supreme Court."[5] I contended that even if this constitutional argument is questionable, what the Constitution does not command, it may still inspire.[6]

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[*] Former Associate Justice of the Supreme Court of the United States. Distinguished Professor of Law Emeritus, Hastings College of the Law.

[1] Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court (1972), *reprinted in* 57 F.R.D. 573 (1973).

[2] *See* Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442 (1983).

[3] Goldberg, *There Shall Be "One Supreme Court,"* 3 Hastings Const. L.Q. 339 (1976).

[4] U.S. Commission on Revision of the Federal Court Appellate System, Structure, and Internal Procedures: Recommendations for Change, *reprinted in* 67 F.R.D. 195 (1975).

[5] In pertinent part, U.S. Const. art. III, § 1 provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (emphasis added).

There is great value in the principle that every person may take a claim involving basic rights and liberties to the Supreme Court of the United States for consideration and final action without reference to any other tribunal. It is this belief by citizens that inspires respect for and reliance upon the Supreme Court as a palladium of liberty and a citadel of justice.[7] Thus, I noted that almost everyone who has sat on the Court has recommended the elimination of diversity jurisdiction as an anachronism,[8] as well as the abolition of direct appeals to the Supreme Court.[9] This recommendation would leave all cases subject to certiorari procedures.

I further objected to a new National Court of Appeals because I was unconvinced that the Supreme Court has the staggering burden which the Chief Justice has referred to on numerous occasions.[10] However, in light of the agreement among a majority of the Court's present Justices that the current number of cases is too onerous to permit deliberate consideration of all cases on the Court's docket,[11] it appears academic to argue that this is not so.

While the Chief Justice's proposal seeks to overcome some of the objections raised in connection with the Freund Report and the Hruska Commission recommendations, I remain convinced that structural reforms are not the answer to the problem. In this Article, therefore, I venture to suggest additional reforms designed to lighten the Court's docket. These reforms can be accomplished by the exercise of self-discipline on the part of the Court and by a simple change in the Court's rules and procedures. My proposals would not require the creation of a fourth tier in our federal judicial system. An additional layer to the judiciary simply would lead to even longer delays and greater expense than now prevail; furthermore, another court with powers that might usurp the Supreme Court's function would be subject to constitutional challenge. Like the proposals of Chief Justice Burger, I deem my suggested reforms to be an experiment; I too would limit the experimental period to five years.

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[6] Goldberg, *supra* note 3, at 339.

[7] *Id.*

[8] *Id.* at 342.

[9] *Id.* The specific recommendation in my earlier article was the elimination of direct appeals from three-judge courts to the Supreme Court. In light of the continuing concern over the Court's workload, I now suggest that the Supreme Court's discretion to hear a case be extended to all appeals to the Court.

[10] *See, e.g.*, Burger, *supra* note 2, at 443.

[11] *See* Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?* 11 HASTINGS CONST. L.Q. 375, 379 (1984).

In the exercise of self-discipline, the Court should limit drastically the number of grants in certiorari applications. There were 123 signed opinions in the 1980-81 Term; during the 1981-82 Term, that figure was 151—an increase of twenty-eight opinions.[12] Either number is too great for thoughtful and deliberate decision of cases on the merits. In exercising its discretionary certiorari jurisdiction, the Supreme Court should limit the number of certiorari grants to no more than 100. There simply are not 100 cases that warrant consideration by the Supreme Court on their merits.

An examination of the argument docket in recent years shows that the Court has been granting certiorari in many cases not worthy of Supreme Court adjudication. After all, our nation's highest tribunal is not a court of error. The Supreme Court's basic function is to decide important issues involving constitutional and statutory construction. Mere errors are properly subject to correction by the federal courts of appeals or the highest court of a state.

As an aid to the exercise of self-discipline, the Court should revise the "rule of four" in considering petitions for certiorari. This rule, simply put, is that certiorari is granted if four Justices vote in favor of the petition. I propose that five votes be necessary for a certiorari grant. This is a reasonable change, since all cases decided on the merits require a majority vote. This simple reform would curtail the argument docket of the Supreme Court and the number of signed opinions. In response to anticipated complaints by lawyers about this proposal, I am compelled to say that during my tenure on the Supreme Court, the Justices rarely changed their positions from the vote on certiorari to the final vote on the merits after briefing and argument.

A second exercise of self-discipline would be to curtail significantly the length and proliferation of writing by members of the Court. Reference to the official reports during Justice Holmes' tenure indicates that the average length of a Holmes' opinion generally was about four and one-half pages.[13] No one can plausibly argue that the great Yankee from Olympus did not adequately deal with the basic issues in the decisions he authored. In contrast, present majority opinions are much longer and, if anything, less enlightening.

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[12] For sake of comparison, it should be noted that in 1953, the first year of Chief Justice Warren's tenure, there were only 65 signed opinions.

[13] *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (regulation of property that goes "too far" will be recognized as a taking) (two pages); Schenck v. United States, 249 U.S. 47 (1919) ("clear and present danger" test set forth) (four and one-half pages).

In addition to majority opinions that are overly lengthy, there is far too much unnecessary writing in concurring and dissenting opinions.[14] Many concurrences do not actually present a different point of view from that expressed in the opinion written for the Court. Where there are real differences that cannot be reconciled and compel a concurrence, such differences should be more succinctly and briefly stated. Differences rarely necessitate several concurrences sounding the same note.

These criticisms are particularly applicable to dissenting opinions. I value dissenting opinions. During the Court's history, many views expressed in dissent ultimately have prevailed.[15] What I find unnecessary are dissenting opinions that more or less repeat the same thesis. By agreement among the dissenters, in most cases, a single dissenting opinion could be filed. If some Justices in dissent would like greater emphasis on certain points, they should negotiate with the main dissenter to have their views incorporated into one opinion.

If these reforms do not substantially alleviate the Court's workload, I then propose a more drastic reform: the creation of panels of three Justices empowered to consider and rule on petitions for certiorari by a majority vote of the panel. This would considerably lighten the burden on the whole Court. It may be argued that petitioners would be deprived of the judgment of the entire Court; my response is that panel consideration by three of the Justices is infinitely better than disposition of certiorari petitions by law clerks, which increasingly has become the practice. If there is a genuine conflict among the circuits, the three-Justice panels should be empowered to refer certiorari petitions raising such conflicts to the full Court for resolution.

Although screening certiorari petitions is highly important, it is not the most crucial part of the Court's work. The vast majority of certiorari petitions raise no significant legal issue. The most important and time consuming aspect of a Justice's work is the hearing and determination of cases on the merits.

It must be emphasized that the drastic solution of a three-Justice panel should be pursued only if my first suggestion is unavailing. The Court should seek to avoid structural reform. By exercising greater discipline and changing the rule of four, the number of cases decided on the merits would be reduced and the workload of the Supreme Court appreciably lightened.

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[14] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam opinion together with concurrences and dissents totaling 294 pages).

[15] *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 37-44 (1883) (Harlan, J., dissenting) (private organization carrying out a public function should constitute state action).

No legislation is required to achieve the reforms I suggest. Reforms similar to those proposed here may be the only alternative because the dearth of legislative history since the Freund Report shows that Congress is reluctant to enact changes. Perhaps the greatest virtue of all is that the suggestions offered here would preserve the Supreme Court as a guarantee to all citizens of every estate, race, or color that our highest Court remains open to their claims that equality of justice under the Constitution has been denied.

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PREPARED OPENING STATEMENT OF SENATOR JOHN P. EAST CHAIRMAN, SUBCOMMITTEE ON COURTS

We meet this morning to hear testimony on S. 704, the "Intercircuit Panel of the United States Act." S. 704 was introduced on March 20, 1985 by the distinguished Chairman of the Committee on the Judiciary, Senator Thurmond. The bill is co-sponsored by 8 other members of the Committee, including 5 members of this Subcommittee.

S. 704 would create the "Intercircuit Panel of the United States," which would be composed of nine judges and four alternates who would be designated to serve for staggered terms by the Supreme Court of the United States from among active or senior-status members of the Federal appellate bench. The Panel would have no original jurisdiction of its own, but rather would consider and decide only those cases referred to it by the Supreme Court. The Supreme Court would retain the discretionary power to review and overrule or modify any decision of the Panel. Otherwise, decisions of the Panel would be final and binding on all courts of the United States and, with respect to all Federal constitutional, statutory, and treaty questions, on all other courts.

Proponents of S. 704 have stated that the primary purpose of the Intercircuit Panel would be to resolve cases that involve conflicting or inconsistent rulings on a question of law between or among the Federal circuit courts of appeals. It is important to note, however, that S. 704 contains no limitation on what kinds of cases the Supreme Court would be authorized to refer to the Panel. The Court could refer any case, even one in which the mandatory jurisdiction of the Supreme Court has been invoked. Likewise, S. 704 contains no limitation on the number of cases that the Court would be authorized to refer to the Panel. S. 704, however, does contain a five-year "sunset" provision.

Most legal scholars and practitioners are agreed that creation of the "Intercircuit Panel of the United States" would constitute the single most significant legislative revision of our Federal judicial system since the enactment of the Judiciary Act of 1925, which established the circuit courts of appeals. Indeed, proposals for the creation of an intermediate appellate body between the circuit courts and the Supreme Court date back to that time.

S. 704, however, is of more recent lineage, beginning in 1971 with the work of the Federal Judicial Center study group chaired by Harvard Law School Professor Paul Freund. Initiated by Chief Justice Warren Burger in his capacity as the Chairman of the Judicial Center, the so-called Freund Group issued a report in 1972 that called for the creation of the National Court of Appeals. This new national appellate body would have screened all appeals and petitions for writs of certiorari to the Supreme Court, and would have decided circuit conflict cases. The membership of the new Court would have been drawn from the Federal appellate circuit benches on a rotating basis.

Following the report of the Freund Group, Congress created the Commission on Revision of the Federal Court Appellate System under the chairmanship of the distinguished former Senator from Nebraska, the Honorable Roman Hruska, who is among our distinguished group of witnesses here today. In 1975, the Hruska Commission also recommended establishment of the National Court of Appeals, albeit with several significant modifications. Beginning in 1975 and continuing through 1981, a succession of bills was introduced in Congress embodying proposals identical or similar to that of the Hruska Commission. None of these measures, however, was enacted into law.

The 97th Congress saw the first departure from the Freund Group and Hruska Commission proposals to create the National Court of Appeals. In both the 97th and 98th Congresses, bills were introduced to establish the "Intercircuit Tribunal of the United States." The "Intercircuit Tribunal" would have been made up of appellate judges designated by the Chief Justice of the United States to sit in panels and decide cases referred by the Supreme Court. In the 98th Congress, this Subcommittee approved S. 645, which would have established the Intercircuit Tribunal, but the full Committee on the Judiciary did not act upon the measure.

As its predecessors, S. 704, the "Intercircuit Panel of the United States Act," has engendered considerable controversy. The bill's proponents argue that the Intercircuit Panel is necessary in order to relieve what Chief Justice Burger has called an "avalanche of cases" overwhelming the Supreme Court. Thirty years ago there were 1500 appeals and petitions for certiorari on the Court's docket. At the close of the Court's 1984-1985 Term, by comparison, there were 4935 such cases. The Intercircuit Panel, these proponents of S. 704 assert, would enhance the ability of the Supreme Court to control its own docket and to ensure the uniformity of Federal law.

Opponents of S. 704, of course, disagree. Some assert that the relatively drastic step of creating an adjunct body to the Supreme Court would not be necessary if only the Court would exercise better management over its docket. They also argue that creation of the Intercircuit Panel actually might exacerbate the Court's workload problem because the Justices would first have to decide which cases to refer to the Panel and later determine which cases decided by the Panel merit full review by the Supreme Court.

Still other critics of S. 704 see a hidden motive behind the proposal for an intercircuit court. The existence of the Intercircuit Panel, they argue, would enable the Supreme Court to refer relatively mundane cases involving intercircuit conflicts and Federal statutory construction to its adjunct court while reserving to itself relatively weighty issues of constitutional law.

Our witnesses today reflect those disparate points of view.

Senator EAST. Senator Heflin, we are delighted to have you here and would be happy to hear any comments you might have.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. Thank you, Mr. Chairman.

First, let me tell you that we are delighted to have you back in the Senate. We have been distressed over your illness, and I would like to say that yesterday, when you arrived on the floor of the U.S. Senate, your friends flocked around you, and those that could not flock around you because there were so many there, all had smiles on their faces, and I know I speak for the entire U.S. Senate in welcoming you back, and hope that you are well on the road to recovery, and we look forward to working with you in solving the many problems that confront our Nation, and also, that confront our courts.

I am particularly interested in this legislation. I have been looking at the problems of the U.S. Supreme Court for a number of years, and have seen graphs that show a steady increase in the number of cases that are filed. We are now in the 5,000 range in regard to the filings that go to the U.S. Supreme Court, and it is a task in itself, determining which cases to decide.

It is interesting to look back to about 1890, when the U.S. Supreme Court had something in the neighborhood of 450 and 500 cases, and at that particular time, there was concern over the burden facing the U.S. Supreme Court and its backlog, and the overfiling of cases.

As a result, the courts of appeals were established, and now, today, the filings are continually increasing. In the past few years, we have increased the number of circuit judges and the number of district court judges by approximately 30 to 50 percent. This is indicative of the fact that we live in a litigious society, and that people resort to courts, and that the courts have a tremendous volume of cases.

This matter has been studied for a long time. Back in 1971, you had the Freund Commission that studied and recommended a national court of appeals; this was followed by the Hruska Commission, and I see Senator Hruska here, who that Commission was named for, that made a similar recommendation for a national court of appeals, to Help eliminate, or help alleviate the problems of the U.S. Supreme Court and its workload.

These two distinguished groups of scholars studied this, and they came forth, and differed as to the type of court. One was commonly called an "entry court" and the other an "exit court," and there were differences on the approach. Senator Hruska later went back and his Commission studied again, and they changed some of their ideas. There was some concern over the Presidental appointment of all of the members of the national court of appeals.

Since 1975, which I believe was the last time there really was a spotlight on this issue, when Senator Hruska was pushing for the national court of appeals, we have drifted, and now, for 10 years, we have drifted, and during that 10-year period, we constantly see the number of cases rise, the graphs go up.

And people say, "Well, by better management." Well, you happen to have life appointments on courts. I do not know how you are going to get better management.

I think every study of every managerial approach toward the courts has been conducted. I imagine there are consultants that have been hired, who have made reports, but basically it is simply a matter that judging involves individual scholarship, individual reading, individual thinking.

And in my judgment, we need to supply additional manpower to meet this problem. The U.S. Supreme Court, historically, has consisted of nine members, and nobody wants to increase that number. There have been talks of dividing it into divisions, but that has raised concern that you would not have the Highest Court in the land. So now we have come up with this trial plan, which would last for 5 years, to use existing Federal judges, who are sitting in their various circuits, and create this intercircuit panel.

In my judgment, I am sort of in the same situation as Jerry Clower, who is an individual back in Mississippi, who tells a story of a farmer and a bear and a wildcat I believe it was, that got up into a tree, and they got to fighting, and a fellow was going to shoot, and he said, "Well, I'm liable to shoot the farmer that's up in there," and finally, the farmer said, "Well, shoot, one of us has got to have relief."

And so I think that we have reached a stage where now somebody has got to have some relief on this, and I hope that we can move forward and at least have a 5-year experimental plan to try to look at this matter.

My own personal feeling is that time has long past for a national court of appeals, but there is still a feeling that maybe that is not the solution.

But I feel like we should go ahead with something right now because we do need some sort of relief. There are cases crying out for resolution.

The Supreme Court disposes of around 300 cases a year, a great number of them, summarily, without opinions, probably in the neighborhood of 150 to 175 a year with opinions.

And when you start looking at that as opposed to the 5,000 cases filed, you are looking at a situation where only about 5 to 7 percent are selected for consideration.

And that means that well over 90 percent of the cases that are filed in the U.S. Supreme Court are not given consideration.

In my judgment, a great number of those cases are crying out for consideration, and something should be done about it.

I believe the Hruska report, in one of its studies, went into the number of conflicts that arose just during a case year, and at that time, that study determined that there were more than 100 conflicts that occurred in the Federal system in the circuit courts of appeal in 1 year.

So I feel that the time has come to do something and I hope that consideration will be given. We look forward to the witnesses testifying.

I have read a great deal of the proposed testimony today. Thank you very much.

[Senator Heflin's prepared statement follows:]

PREPARED STATEMENT OF SENATOR HOWELL HEFLIN

Mr. Chairman, let me first commend you for your leadership as chairman of the Subcommittee on Courts. I am pleased to serve as the ranking minority member on this subcommittee, and it is especially good to have you back among your colleagues.

Today, the Subcommittee on Courts will consider Senate bill 704, introduced by Senator Strom Thurmond, the distinguished chairman of the Senate Committee on the Judiciary, to establish an intercircuit panel, which will decide cases referred to it by the Supreme Court of the United States. I am an original cosponsor of this bill which was introduced March 20 of this year.

The panel will be established for an experimental 5-year period, and will be composed of nine judges and four alternate judges of the circuit courts, designated by the Supreme Court. The panel is not a cure-all for the problems facing the Federal judiciary.

The purpose of the intercircuit panel is twofold: To lessen the burden on the Supreme Court and to provide an additional forum for resolving intercircuit conflicts.

In his report to the American Bar Association on February 17, 1985, Chief Justice Warren E. Burger related some rather staggering figures. At the beginning of the 1953 term, there were 1,463 cases on the docket. The Supreme Court rendered 65 signed opinions in that year. In 1984, there were 5,006 cases on the docket. The Court rendered 139 signed opinions. Chief Justice Burger stated that in each of the past three terms, the Court decided an average of 48 cases involving conflicts.

During testimony before the Senate Budget Subcommittee, this past summer, Justice Byron White stated that during the 1984 term, he publicly "dissented 54 times from the Court's refusal to review a case raising an issue that (he) believed it should address." The bulk of these 54 cases involved conflicts or confusion among the lower courts. The intercircuit panel would provide a forum for resolution of these conflicts, unless modified or overruled by the Supreme Court, decisions of the intercircuit panel would be binding on all courts of the United States.

There are those who reject the concept of the panel outright. Others believe there has been no demonstrated need for the panel. I do not propose the panel as a solitary solution for solving the problems facing our courts. That would indeed be shortsighted. But I feel strongly that our biggest mistake is through inaction, not action.

In the past, I have been an advocate of a permanent national court of appeals and still believe a permanent structure would be beneficial. In the 1970's, two independent studies recommended the creation of such a court to provide relief to the Supreme Court. In 1971, Chief Justice Burger appointed a seven-member study group to review the caseload of the Supreme Court. This group, headed by Prof. Paul A. Freund, recommended that Congress establish a seven-member national court of appeals.

In 1973, Congress established a Commission on Revision of the Federal court appellate system, called the Hruska Commission, in honor of its able and distinguished chairman, Senator Roman Hruska. This Commission was mandated by statute to study the structure and internal procedures of the U.S. Circuit Courts of Appeals system. The Hruska Commission also recommended a national court of appeals, although substantially different from the one recommended by the Freund Group.

We lose the value of these studies if we fail to acknowledge their rcommendations. The problem will not go away. When our forefathers established one Supreme Court and provided for such inferior courts as the Congress may from time to time ordain, they established a system that has served us well. And it is good that any attempt to change that system is deliberate and well reasoned. But our fear of change must not hinder the possibility of progress.

Chief Justice Burger indicated that currently there are 758 district judges and 226 circuit judges authorized, and about 27,000 State court judges, all deciding cases which potentially may be subject to review by the Supreme Court. That is a total of about 28,000 judges. The Supreme Court remains unchanged at nine.

It is unrealistic to expect nine individuals to handle the caseload now before the Supreme Court. Granted, there is no method of reform which will enable the Court to hear all the cases now on the docket.

We have become a litigous society. We look to the courts to settle every facet of human relations. Some of these cases are meritorious, some contain issues of national significance, many are frivolous. But if we fail to provide some relief, the sheer number of cases may one day dictate the quality of justice rendered in our courts.

The purpose of this legislation is not to usurp the power of the Supreme Court or the circuit courts of appeals. There is only one Supreme Court. But the intercircuit panel will allow resolution of cases that might otherwise be denied a forum.

This legislation establishes the panel on an experimental 5-year basis. There is a possibility the panel will not meet our expectations. But as Professor Freund once stated, it is better to judge its effectiveness by experience rather than through speculation.

I welcome each of the witnesses and I look forward to your thoughts on this legislation.

Thank you, Mr. Chairman.

Senator East. Thank you, Senator Heflin. I appreciate your comments.

Senator Heflin. I would like the statements of some of the judges that were unable to be here—I believe Judge Seitz of the third circuit and Judge Godbold of the eleven circuit have statements, and if we could, I would ask unanimous consent that their statments be submitted for the record.

Senator East. So ordered. In addition, Senator DeConcini has asked me to submit his prepared statement for the record at this point.

[Statements referred to above follow:]

Prepared Statement of Collins J. Seitz, Judge, U.S. Court of Appeals for the Third Circuit

Mr. Chairman, I am Collins J. Seitz. I have been a judge of the U.S. Court of Appeals for the Third Circuit for over 19 years. The third circuit consists of the States of Delaware, New Jersey, Pennsylvania, and the Territory of the Virgin Islands. As a presiding judge, State and Federal, for many years, I have had an abiding interest in an effective justice system.

I file this statement in support of Senate bill 704 on my own behalf at the invitation of this Subcommittee on Courts. Senate bill 704 would create an intercircuit panel of the U.S. Courts of Appeals to alleviate the ever-increasing workload of the Supreme Court of the United States. It is a modest and experimental effort which will be subject to the scrutiny of Congress after a reasonable trial period.

It seems to be the nature of our political process to address matters of major concern only after those problems reach crisis proportions. This is particularly true with respect to the judiciary, where it is difficult to generate a general public recognition of major problems and the need to address them. When this factor is combined with the inertia indigenous to the legal system, ill-considered crisis solutions often result.

I believe that the workings of our Federal judiciary need to be reexamined objectively at reasonable intervals, to ascertain whether changes are needed, even though a crisis is only on the horizon. If a need is demonstrated, changes in the form of experimental alternatives are surely appropriate. Limited experimental congressional solutions are particularly valuable when they do not create a large bureaucracy. Furthermore, they permit Congress to examine the value of the results flowing from the experiment within a reasonable period. Senate bill 704 is particularly valuable because Congress will not be confronted with an entrenched lobby with a vested job interest at the end of the experimental period.

I think it fair to say that the initial and basic problem facing those who are suggesting some relief for the Supreme Court of the United States is to convince the concerned movers and shakers that something more than mere cosmetic changes in the Court's operation is required. As a threshold matter, I fully realize that if the Court itself is not convinced that help is needed, it will be practically impossible to convince the Congress otherwise. I therefore write on the assumption that the Court recognizes the need for something more than a de minimis change.

Some of the opposition to any congressional assistance along the lines of Senate bill 704 arises from allegations that the Court's volume is too great only because of the sweep of some of the Court's decisions or the differing views of the Justices as to what is cert. worthy. I do not believe these allegations are relevant to a debate on the need for a solution to assist the Court. I say this because consideration of these factors, in the present context, comes dangerously close to an attempt to dictate to the Court what it should hear and how it should decide what is heard. Furthermore, they imply that the Court should constrict its appellate function regardless of the numbers of cases otherwise appropriate for review in the interest of establishing a national rule of law.

I believe that a substantial statistical and practical case has been made out for providing relief to the Court without diluting its responsibility as our one Supreme Court. The proposed legislation has a simplicity and practicability about it that, too, makes it appealing. At the same time, its provision for a 5-year experimental period will generate for the Supreme Court and Congress concrete evidence as to whether a need has, in fact, been demonstrated and, if so, what mechanism would be appropriate to meet it. In the meantime, this bill will provide a vehicle for the Court to process such worthy cases calling for a uniform national rule of law, with the Court always having the right to the last word.

The genius of our democracy has been its ability to recognize and adjust to changing conditions and provide the means to deal with them. The state of the Supreme Court's workload, in my opinion, entitles the Court to congressional assistance. I favor passage of the intercircuit panel of the United States Act. It will, in a modest way, provide an experimental means to provide that assistance without meaningful disruptions of the Federal judicial system.

PREPARED STATEMENT OF JOHN C. GODBOLD

CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

My name is John C. Godbold, and I am from Montgomery, Alabama. I have been a United States Circuit Judge for 19 years. I served as Chief Judge of the former Fifth Circuit Court of Appeals before it was divided into two circuit courts. In 1981, after the division, I became Chief Judge of the Eleventh Circuit and still serve in that capacity. The Eleventh Circuit is composed of the states of Alabama, Florida and Georgia.

For five years I served as a member of the Board of Directors of the Federal Judicial Center.

I am glad to accept the invitation of this Committee to discuss with it my views on S. 704. They are, of course, not stated as the views of my court or of its Judicial Council.

I support the concept embraced in S. 704 of an intercircuit panel as one of the means to ameliorate the workload of our Supreme Court.

The initial and primary assignment of the Intercircuit Panel should be to relieve the Supreme Court from the burden of deciding intercircuit conflicts, which each year occupy a substantial part of the Court's oral argument calendar. This will directly assist the Supreme Court. It will also benefit the circuit courts of appeals because it will free the Supreme Court to respond to needs of the circuits for decisional guidance that can be given by only the Supreme Court.

From time to time suggestions have been made aimed at solving the matter of intercircuit conflicts by preventing such conflicts from arising or by minimizing the number of them. One suggestion is that the first decision of an en banc circuit court on a particular issue shall establish the law for all circuits on that point. This poses the possibility that the law for all circuit courts, who are the final level of decision for more than 90% of federal appeals, might be established by a three-judge majority of the First Circuit sitting en banc, or a six-judge majority of the Ninth Circuit's mini en banc court. There is a disturbing element of chance involved in this proposal. Should an expert oil and gas circuit like the Fifth be bound by the fortuitous, but first, en banc decision of a gas and oil issue by a court that seldom encounters such a case? Or, let me put the proposition in its sharpest form. The circuits of the South have lived for 25 years at the cutting edge of school desegregation in all its aspects -- students, faculty, transportation, extracurricular activities. They have the background and experience that emanate from the difficult decisions, and the nuances, of thousands of cases. It would not serve the national interest that these circuits be bound by the decision on some new point of desegregation law entered by an en banc court from a circuit in which desegregation is l'ttle more than an abstraction.

Another suggestion seeks to minimize conflicts by requiring that each circuit court sit en banc on each of its cases in which a conflict is created or continued. This presupposes that a court en banc will align itself with the views of another circuit, and lay aside its own views more readily, than will a three-judge panel of the court. I know of no basis for this hypothesis. Also, this proposal raises another problem that I will refer to in a moment. In short, settlement of circuit conflicts by an external forum is preferable to artificial mechanisms that seek at the circuit level to prevent them from arising or limit their number.

I have not seen objective statistical data outlining the number of intercircuit conflicts that exist, but I can give you a small corner of the picture. In 1982, when it was suggested that each circuit sit en banc on each case in which a conflict with another circuit was continued or created, the Eleventh

Circuit conducted a study to determine just what this suggestion would mean to it. From our 1200 published opinions handed down during one court year our staff attorneys randomly selected and analyzed 200. Fifteen of these cases either initiated or continued a conflict with another circuit. This meant, since a one-to-six sample was employed, that in this one court year 90 cases would have had to be heard en banc because they involved conflicts. No circuit court could do this and continue to perform its other functions. Some of the 15 identified cases merely continued an existing conflict. But the extrapolated number of cases creating new conflicts with other circuits was 36. Sitting en banc on 36 cases, plus cases voted en banc for other appropriate reasons, is not possible.

Considering these figures from only one of the circuits, it is obvious that nationwide, even if the backlog of existing conflicts were eventually chipped away, the number of new conflicts created each year by all the circuits will be substantial.

Not all conflicts need to be resolved. Perfect homogeneity and harmony of decisional law is not necessary. Some conflicts involve minor or nonrecurring points and, as to these, the existence of differing views by the circuits has little practical importance. But each year the Supreme Court finds a significant number of conflicts involving sufficient national significance that the Court feels require unifying attention. These cases the Court can select and refer to the Intercircuit Panel. The Court can grant certiorari when the decision of the Intercircuit Panel is of such importance that it deserves the final stamp of the Supreme Court itself. But this number will not be large. The Court desires the assistance of the Intercircuit Panel. We can fairly predict that the Court itself will not make that assistance an illusion by insisting upon reviewing too many of the Panel's decisions.

Once the Court is freed of circuit conflict cases, it can devote some of its attention to other matters that press upon the circuit courts. I am confident that each circuit has one or more fields of the law in which it particularly hopes for guidance. For the Eleventh Circuit there is an imperative necessity for decisional guidance by the Supreme Court in death cases, particularly habeas corpus review of death cases. Controversy over the death penalty is tearing at the fabric of our society. The number of prisoners under death sentence in the United States is now estimated at close to 1,600. More than one-fourth of these are in the three states of the Eleventh Circuit. Our court maintains a constant inventory of 40 to 60 death cases in various stages. Nearly every case carries with it at least one emergency request for a stay of execution. Many of the litigants have been in prison for years. The federal courts may have seen a particular habeas corpus death case only recently, but because they are the courts of final decision a dissatisfied public holds them responsible for the overall delay in reaching a final determination. The law surrounding the death penalty has been in the process of development and change since the mid-1970's and will continue to be. The unanswered questions are numerous and ever-changing. In this field we need the attention, the understanding, and the steady hand of the Supreme Court.

Some members of the bar who support the concept of the Panel have expressed a concern that designation of judges to the panel be through a process that necessarily ensures diversity of judicial philosophies. I suggest, therefore, that the Committee consider a system under which designations are made by the Supreme Court from nominees suggested by the members of the Court and that each designation made by the Court be with the advice and consent of the chief judge of the nominee's circuit. This will advance the concept of diversity and will give the Court input from the chief circuit judges, who know best the qualifications of the judges from their respective circuits.

Also it will protect a circuit from partial loss of the services of a judge who, for some particular reason, cannot be readily spared.

The suggested composition of nine judges and four alternates is desirable. Earlier suggestions of 25 to 30 judges would create an unmanageable body.

S.704's provision that cases be "heard and determined by the Panel" presumably contemplates that nine judges will sit together. A nine-judge body is unnecessarily large. Five-judge panels, each consisting of four judges and the chief judge, would be preferable. I have served on a circuit court of 12 and then of 13 members, sitting in panels of three. I do not know the number of possible combinations of judges on panels of that court; certainly it was in the hundreds, possibly beyond a thousand. Yet the court was able to maintain what it considered to be a reasonably stable and predictable body of law. Moreover, participation by all panel judges in every case will demand too large a commitment from judges who are expected to carry on with the work of their own circuits.

While I have commented upon some of the details of the structure of the Intercircuit Panel, these may be the subject of reasonable differences of opinion. But details can be worked out.

I hope that Congress will consider the impact upon the circuits of sending a judge or judges to the Intercircuit Panel. I have no suggestion on how to ameliorate this loss beyond relaxation of the restraints on intercircuit assignments of judges. Despite the impact upon the circuits I think it is important that the Intercircuit Panel be composed of judges coming from the circuits.

One of the strong merits of the concept of the Intercircuit Panel is that it will not create a four-tier federal system. Nor does it pose a threat to the dignity and status of the courts of appeals as the second line of a three-tier system. In name and in operation it will be tied closely to the circuits. Its judgepower, and thus its leadership, will be drawn from the circuits, and the principal duty station of each judge will remain with his or her circuit. I have suggested that circuits have input in the designation process. The strength and influence of the circuits will continue to be fed into the Panel as replacement judges are drawn from the circuit courts. In its function of resolving conflicts the Panel will resemble an en banc panel for the circuits, sitting as needed, with membership drawn from the circuits and revolving over the years, but with the cases to be heard en banc, as it were, selected by the Supreme Court.

In another sense the Panel may be viewed as serving as a decisional master for the Supreme Court, entering decisions in matters referred to it by the Court. As with report of a master, the Panel's action will be subject to rejection, but one can reasonably expect that in most instances it will be accepted.

It pains the legal profession, especially judges and academics, to make changes in judicial institutions. Under our common law, with its emphasis upon stare decisis and precedent, we live with one foot in the past and our eyes and our senses looking backward. Our profession is rooted in the past and the present, and we like our judicial institutions to remain as they are.

I lived through ten years of struggle over dividing the former Fifth Circuit into two courts. Those both on and off the court who favored division were met with innumerable motions for continuance, asserting the best arguments for delay that ingenious minds could devise. Wait for national realignment of all circuits at once. Wait for a revamping of all federal jurisdiction. Wait for Congressional action cutting down on the flow of habeas corpus and § 1983 cases. Wait for Congressional approval of massive increases in staff to assist each judge in his work. Wait for judges to learn to write shorter opinions. Wait for America to become a less litigious society.

There will be as many motions for continuance addressed to this Committee. Wait for legislation redefining the jurisdiction of the Supreme Court. Wait for the creation of specialized courts. Wait for the Supreme Court to sit in panels. Wait for certiorari petitions to be considered by less than the entire Court. Wait for the justices to write shorter and fewer opinions. Wait for empirical studies that demonstrate the Supreme Court's need for help.

Inertia does not meet perceived needs. Motions for continuance never reach the merits. Sometimes they merely delay and divert attention from the matter needing decision. For a generation all circuit courts have been asking for and receiving additional judgepower to meet the increasing demands upon them. They have rightfully rejected suggestions from many sources that they really do not need help and if they are ingenious enough and work harder they could get along without additional judges. In the same fashion, the Supreme Court is entitled to the assistance that the Court feels it needs. And, I add, the justices unanimously, or almost so, feel that they need help. Nobody is better able than they to form a judgment on this. I accept their judgment of need. I support the concept of S. 704 as a means of meeting that need and at the same time of benefitting the circuit courts by giving them additional Supreme Court decisional guidance in fields of the law where it is needed.

Finally, the Committee will be interested to know that within the last few days the Alabama State Bar Association and the Georgia Bar Association have considered S. 704 and have formally approved the concept of an intercircuit panel addressed in the bill.

PREPARED STATEMENT OF HON. DENNIS DECONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Mr. Chairman, I am a cosponsor of S. 704, as introduced by the distinguished chairman of the Judiciary Committee. I wish to voice my continued support for the bill and my hope that it will shortly come before the full committee.

The bill is a response to the needs of the Federal court system which is awash with litigation. Today we are seeing more and more instances of cases with similar facts and circumstances arising under the same law being decided differently among the circuits and sometimes within a circuit. The result is confusion and a perception that our Federal judicial system is failing. Furthermore, with the persistent influx of new and more difficult cases, there is a greater demand for predictability, stability, and uniformity. It is the responsibility of Congress to insure that our Federal court system has the structural capability of meeting its constitutional role of determining what the law means. I believe this bill gives the judicial branch the institutional tool it needs to perform this mission.

It is the role of the Supreme Court to settle disputes among the circuit courts. However the burden falls on a Supreme Court whose docket already far exceeds realistic manageability. As Chief Justice Warren Burger stated in public comments on this issue, "only changes in routing circuit conflict cases will provide a solution that will maintain the historic posture of our Supreme Court." I believe that an intercircuit panel can allow stability, predictability, and uniformity while maintaining the historic posture of the Supreme Court as the court of final decision.

S. 704 is an experiment to try to help the Federal court system with its problems. To achieve justice, you need predictability and uniformity and the bill will go a long way toward giving both. It is a thoughtful, modest, deliberate step devised to meet a more difficult problem. The idea of an intercircuit tribunal is worthy of being tested. I hope we move promptly on the bill.

Senator **EAST**. Thank you very much for your valuable comments, Senator Heflin. At this time, I would like for Hon. James M. Spears, please, to come forward. Mr. Spears is the Acting Assistant Attorney General in the Office of Legal Policy at the Department of Justice.

Mr. Spears, we welcome you here this morning and appreciate you taking time from your busy schedule to be with us.

Again, I would like to remind you, as you well know, that your printed remarks can be made a part of the permanent record and I would appreciate it, the subcommittee I think as a whole would appreciate it, if you could make your extemporaneous remarks relatively brief, or to the point, as much as you can.

Thank you. We welcome you.

STATEMENT OF HON. JAMES M. SPEARS, ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE

Mr. **SPEARS**. Thank you, Mr. Chairman. Senator Heflin. It is a pleasure to be before you today and the committee is to be commended for holding these hearings to explore the dimensions of the workload problem in the Supreme Court.

Over the past few years, there has been a significant increase in the number of cases before the Supreme Court, increasing in 5 years from 156 cases in the 1979 term to 184 in the 1983 year term, that were argued before the Court. Although superficially it might appear that the Justices should bear some responsibility for this increase, the growth in the caseload in the Federal court system as a whole makes it clear that the Supreme Court's exercise of its certiorari jurisdiction is not the essential problem.

While the increase in the Supreme Court's docket is significant, it actually greatly understates the dramatic increase of the Federal court caseloads generally in recent years. Between 1980 and 1984, that same period, for example, filings in the district courts rose from 198,000 to 298,000 cases. During that same timeframe, filing in the courts of appeals have risen from 23,000 to 33,000. Thus, in just 5 years, we have seen the number of district and circuit court filings increase by 51 percent and 44 percent, respectively.

Senate bill 704 would seek to reduce the Supreme Court workload by creating a temporary intercircuit panel of the U.S. Courts of Appeals to render nationally binding decisions in cases referred to it by the Supreme Court. Proponents of the proposal have argued that the creation of the panel will free the Supreme Court to devote more of its time to the more important statutory and constitutional cases. The panel could serve particularly well by resolving intercircuit conflicts in the interpretation of statutes.

The panel's opponents' principal criticisms are that the panel would address only a symptom and not the cause of the explosion in the number of Federal cases; that the Court's current workload is not excessive and the Court already has sufficient tools to control its workload; and that a surrogate, nationwide appellate authority is inadvisable because it would allow the Supreme Court to devote too much of its time to constitutional questions and thus overconstitutionalize the law; and that despite the bill's "sunset" provisions, the panel is not likely to be a temporary institution.

We see merit in the arguments of both the proponents and opponents. On balance, however, but for the following two substantial concerns, we would recommend that the panel be established over the period proposed by Senate bill 704, so that the debate over the panel could be better informed in the long term.

Our first concern is with Senate bill 704's provision for appointment of the panel's membership by the Supreme Court itself. That raises a substantial constitutional issue of whether membership on the panel—the second most important court in the country—would constitute an office of the United States to which one must be specifically appointed by the President with the Senate's advice and consent.

We do not think that question need be resolved here, however, because it is clear to us, that as a matter of constitutional policy, the panel should be appointed by the President and subject to the advice and consent of the Senate. This would preserve for this unique panel the traditional role in judicial appointments played by the executive and legislative branches under the checks-and-balances structure of our Constitution.

Our second concern is more fundamental. We have serious doubts about the wisdom of addressing the Federal court overload by simply adding another court, without first doing something about the underlying causes of that overload. The Supreme Court workload is but one manifestation of the problems facing the Federal courts. A clearer manifestation is that case filings in the district courts have increased by 51 percent in just 5 years.

Unless Congress takes some steps to reduce and stabilize the number of cases reaching the Federal courts, the creation of an intercircuit panel, or the establishment of new district and circuit court judgeships are at best stopgap remedies which will ultimately fail.

Accordingly, it is within this broader context of court reform, that the intercircuit panel proposal must be considered.

The questions we should be asking ourselves are: Where are the 298,000 annual district court filings coming from? Why has that annual number increased by 100,000 in just 5 years?

The general answer is that these cases are, for the most part, brought pursuant to some Federal statute, as it has been applied and interpreted by the courts. It is incumbent upon Congress to periodically review these statutes, and the court decisions construing them, to see if their original purposes are being fulfilled.

We believe that the existing Federal court crisis is in part predicated on statutes that, over the years, have been transformed into new rights and causes of action that now bear little, if any, resemblance, to the original congressional intent or traditional causes of action.

The growth of prisoner litigation is a good example. Thirty years ago, the number of suits brought by prisoners in the Federal courts each year was about 1,300. Today, the annual number is 31,000—12 percent of all the civil cases that we see—and the number continues to increase rapidly from year to year. We have seen a 34-percent increase in prisoner cases since just 1980.

Congress never authorized this flood of prisoner litigation. Its growth is primarily attributable to judicial decisions. Suits brought by State prisoners now account for 10 percent of all civil cases in the Federal courts, and 31 percent of those State prisoner suits are habeas corpus petitions.

There is widespread support among State and Federal judges for reform of this procedure by which Federal district courts in effect engage in appellate review of State criminal cases.

Pending administration-supported legislation would reduce the number of habeas corpus petitions filed in Federal court by State prisoners by setting a time limit for applications, restricting the standard of review for claims that may have already been adjudicated in State courts, and tightening the rules for consideration of claims not previously raised.

The tremendous growth in the number of actions under 42 U.S.C. 1983, in both the nonprisoner and prisoner contexts, also demands congressional scrutiny. In 1960, only 280 suits filed in the Federal district courts were characterized as "civil rights" actions. We have estimated that for 1984, section 1983 suits alone accounted for about 28,000 cases in the district courts or about 10 percent of all civil cases.

Section 1983 was originally enacted in 1871 as a direct response to the rise of the Ku Klux Klan terrorism in the South, and the general unwillingness or inability of the governments in the former Confederate States to enforce the Reconstruction-era amendments and their implementing legislation in the face of this pervasive disorder.

Originally intended as a narrow civil remedy, section 1983 has ballooned in the last two decades into a major source of Federal court litigation with a scope far beyound anything Congress may have contemplated back in 1871. The 1,492 pages of case annotations for section 1983 reflect the enormous range of State and local activity that is now subject to it.

Significant section 1983 reform would certainly reduce the large number of generally spurious claims that are now brought under that section and allow the courts to focus on those which are essentially dealing with civil rights issues, constitutional issues, and merit serious consideration by the courts.

As explained in detail in our written statement, we urge that Congress consider the following possible reforms to section 1983.

One: Eliminate section 1983 as a basis for prisoner petitions.

Two: Eliminate section 1983 as a basis for negligence claims, thus avoiding the situation where we have essentially turned Federal courts into courts of general tort jurisdiction.

Three: Eliminate section 1983 suits for claims arising under Federal statutes not relating to civil rights or equal protection. Again, equal protection of civil rights is the focus and the fundamental purpose for section 1983, and that purpose should be preserved and enhanced.

Four: Provide a good-faith defense for municipalities. In 1980, the Supreme Court ruled that municipalities are persons under the liability provisions of section 1983, yet, at the same time ruled that municipalities do not have available, or may not erect, a good-faith defense, as any other person subject to suit under 1983 may. This we think would cut out a lot of spurious claims.

Five: Prohibit punitive damages, or at least restrict them to truly egregious cases.

Six: Require exhaustion of State administrative remedies.

Seven: Require exhaustion of State judicial remedies.

Finally, place a limit on attorney fee awards.

Another area that is ripe for reform is Social Security litigation. There has been broad interest and support in recent years for the creation of an article I Social Security court with nationwide jurisdiction to assume the reviewing function in Social Security cases that is currently being carried out by the Federal district courts.

Such a reform would bring about a major reduction in the caseload of the article III courts. The volume of Social Security Act cases has been increasing astronomically. In the last 5 years it has increased 232 percent, and now comprises 11.5 percent of all civil cases in Federal courts.

Limiting Federal diversity jurisdiction would be a particularly effective means of relieving the Federal caseload problem as well. In 1984, diversity jurisdiction accounted for 57,000 new cases. In recent years, diversity cases have generally accounted for about 25 percent of all civil filings, 40 percent of all civil trials, and 60 percent of all civil jury trials in the Federal courts. The magnitude of the diversity caseload affects appellate courts as well. About 15 percent of all appeals of district court decisions arise in diversity cases.

While a persuasive case can be made for the elimination of diversity jurisdiction, we suggest that Congress consider the following reforms short of absolute abolition.

First: Increase the amount in controversy from the current $10,000 minimum to at least $35,000. This would account for inflation since the last increase back in 1958. You could go higher than that, to as high as $100,000 or $250,000, but the point is that in 1958 we established the $10,000 limitation, and inflation has effectively reduced the threshold on the amount in controversy to get into Federal court by over 70 percent.

Second: Deny diversity to in-State plaintiffs.

Third: Eliminate diversity for auto accident cases.

Fourth: Reduce the number of cases by treating corporations as citizens of States where they are licensed to do business.

Another possible area of reform is Supreme Court mandatory appeals. Currently, 25 cases in the Supreme Court's calendar this last term were mandatory appeals. By making those permissive and giving the Supreme Court some discretion in whether to grant those cases, we would pull 25 off the Supreme Court's calendar.

To sum up, Mr. Chairman, the general growth of litigation in the Federal courts has resulted in a serious workload problem for the Supreme Court. However, a response that only addressed and temporarily accommodated the effects of this litigation explosion would be inadequate. It is like addressing the "tip of the iceberg."

Chipping off the top of the "iceberg" is not going to reduce the hazard to navigation. There is a mass of Federal litigation underneath it.

It is essential that these root problems behind the growth and caseload of the Supreme Court and the lower Federal courts be addressed by a broad-based set of reforms.

To do that, Congress must revisit the statutes that have fostered the current litigation explosion. We have today put forth a package of possible court reforms. They include completing the evolution of the Supreme Court's jurisdiction toward discretionary review, limiting diversity jurisdiction, addressing the problem of State prisoner petitions, section 1983 reform, and establishing an article I Social Security court.

The long and short of it is that Congress can revisit these statutes now or do it later. We cannot continue to live indefinitely with a Federal caseload that more than doubles each decade. Makeshift solutions will not take care of the problem. We strongly urge Congress to take action now.

I will be happy and prepared to answer any questions that you may have, Mr. Chairman, or you, Senator Heflin.

[Prepared statement follows:]

PREPARED STATEMENT OF JAMES M. SPEARS

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear today on behalf of the Administration to discuss the nature and causes of the workload crisis now faced by the federal courts, and possible solutions to that problem, including the Intercircuit Panel proposed by S. 704.

My testimony will first briefly address the background and purpose of the Intercircuit Panel proposal. I will then attempt to place that proposal in the broader context by discussing the fundamental causes of the rising federal court caseload and suggesting some legislative court reform proposals that Congress should consider to reduce the caseload. I will conclude by returning to the Intercircuit Panel proposal and setting forth the Administration's position on the need to approach court reform issues on a coordinated basis, rather than focusing exclusively on a structural change like the Panel proposal without addressing the underlying causes of the court overload.

I. THE INTERCIRCUIT PANEL PROPOSAL

A. The Supreme Court's Workload

You are to be commended, Mr. Chairman, for holding these hearings to explore the dimensions of the workload problem in the Supreme Court. Over the past few years, there has been a significant increase in the number of cases argued before the Supreme Court -- increasing in five years from 156 in the 1979 Term to 184 in the 1983 Term. 1/ Superficially, it might appear

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1/ Statistics in this statement on the Supreme Court are taken from the annual reports of the Solicitor General's Office, which are published as part of the Annual Report of the Attorney General. Those numbers refer to the terms of the Supreme Court, which normally run, for statistical purposes, from July of one year to July of the next. For example, the 1983 Term ran from July 5, 1983 to July 1, 1984. The statistics on inferior court caseloads are taken from the Annual Reports of the Director of the Administrative Office of the U.S. Courts. Those numbers refer to the Administrative Office's reporting years, which end on June 30. For example, reporting year 1984 covers the twelve-month period ending June 30, 1984. Since the most recent Administrative Office Annual Report is for reporting year 1984, the statistics given in this statement are for that year for the lower federal courts and for the corresponding 1983 Term for the Supreme Court.

[illegible]

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B. [illegible]

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date of the first referral of a case to the Panel by the Supreme Court. It would then automatically go out of existence, unless continued by new legislation.

Proponents of the Intercircuit Panel proposal have argued that creation of the Panel would free the Supreme Court to devote more of its time to the most important statutory and constitutional cases, thereby helping to ensure adequate time for reflection and deliberation on the Court's most critical decisions. The Panel could serve particularly well by resolving intercircuit conflicts in the interpretation of statutes.

Creation of an Intercircuit Panel would also arguably enhance the Supreme Court's ability to supervise the lower courts. As a result of the astronomical growth in the volume of federal appellate litigation in recent years -- again, court of appeals filings rose 36% just between 1980 and 1984 -- the Supreme Court is able to review an increasingly small fraction of circuit court decisions. This tends to cast the circuit courts in the role of de facto supreme courts on many matters for the areas of the country they serve, and circuit judges may be encouraged to press beyond Supreme Court precedent in the knowledge that the likelihood of further review is very slight in most cases they decide.

The Panel opponents' principal criticisms are that (a) the Panel would address only a symptom and not the cause of the explosion in the number of federal cases, (b) the Court's current workload is not excessive and the Court already has sufficient tools to control its workload, (c) a surrogate nationwide appellate authority is inadvisable because it would allow the Supreme Court to devote too much of its time to constitutional questions and thus "over-constitutionalize" the law, and (d) despite the bill's sunset provision, the Panel is not likely to be a temporary institution.

We see merit in the arguments of both the proponents and opponents. On balance, however, but for the following two substantial concerns, we would recommend that the Panel be established for the period proposed by S. 704 so that the debate over the Panel could be better informed.

Our first concern is with S. 704's provision for appointment of the Panel's membership by the Supreme Court. The President has, of course, traditionally appointed all federal judges, with the advice and consent of the Senate -- pursuant to Article II, Section 2 of the Constitution. S. 704 raises the substantial constitutional issue of whether membership on the Panel -- the second most important court in the country -- would constitute an office of the United States, to which one must be specifically appointed by the President with the Senate's approval. We do not think that question need be resolved here, however, because it is clear to us as a matter of constitutional policy that the Panel should be appointed by the President and confirmed by the Senate. That would preserve the traditional role of the executive and legislative branches in judicial appointments; and the unique stature and authority of the Panel especially warrant review of the selections by the political branches under the checks and balances structure of our Constitution.

Our second concern is broader and more fundamental. We have serious doubts about the wisdom of addressing the federal court overload by simply adding another court without first doing something about the underlying causes of that overload. The Supreme Court workload is but one manifestation of the problems facing the federal courts. A clearer manifestation is that the case filings in the district courts have increased by 51% in just five years. Congress must draw its attention to where the 298,000 cases filed in 1984 come from and decide whether it will take action to control this flood of litigation. Unless Congress takes steps to reduce and stabilize the number of cases reaching the federal courts, the creation of an intercircuit tribunal or the establishment of new district and circuit court judgeships are, at best, stop-gap remedies which will ultimately fail. Accordingly, it is within this broader context of court reform that the Intercircuit Panel proposal must be considered.

II. THE NEED FOR FUNDAMENTAL COURT REFORM

A. General Causes

I would not presume to take this committee's time to give a complete analysis of the fundamental causes of the federal court overload -- nor would I claim the ability to do so. My principal message is that all three branches of the government should bring their attention and abilities to bear on identifying and responding to those fundamental problems. However, having examined the issue, we believe that there are some readily identifiable factors that have contributed to the explosion of federal litigation and there are some remedial steps that can be taken.

There are certainly many causes of the caseload crisis. While there can be no doubt that judicial decisions 3/ and legislation 4/ that encourage litigation have contributed, I wish

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3/ In recent times, the Supreme Court has been hospitable to constitutional arguments that address claims whose resolution has traditionally been the responsibility of the state judiciaries or the political process. The Court has contributed to the trend in which the role of judges is viewed less as one of interpreting the Constitution and statutes, guided principally by their text and the legislative intent of the Framers and Congress, and more as one of resolving public policy questions as guided by the perceived values of an enlightened society. This Administration has consistently challenged, and taken steps to reverse, this trend of moving from interpretivism to judicial activism. See generally Statement of Assistant Attorney General Jonathan C. Rose on the Workload of the Supreme Court Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary (November 10, 1983).

4/ As the federal government has assumed a greater role in the economic and social life of the nation, the function and authority of the federal courts has also greatly expanded. The courts have been charged with the interpretation and implementation of a plethora of new statutes and regulations. In proposing and enacting many of these initiatives, particularly the economic regulatory statutes passed in the last two decades, both the Executive Branch and the Congress have unnecessarily encouraged litigation and have, in effect, left critical policy decisions for resolution by the courts.

If all federal statutes were precise and unambiguous, and judicial review of their implementation were properly circumscribed, the resulting role and workload of the courts would be less significant. Under many federal statutes, however, the substantive standards or standards of review (or both) are ambiguous or inconsistent. This thrusts the courts into a policy-making role and ensures that abundant opportunities for litigation will arise in the administration of the affected programs.

The adverse consequences of effectively delegating legislative functions to the courts through vague or open-ended statutes are frequently compounded by legislative decisions to delegate enforcement functions to unaccountable private interests. This tendency is reflected both in broad statutory definitions of the classes of persons given standing to sue under regulatory statutes and in ever-broader statutory authorization of awards of attorneys' fees against the government. See generally Statement of Assistant Attorney General Jonathan C. Rose on the Workload of the Supreme Court Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary (November 10, 1983).

to suggest today a more direct way of approaching the court overload crisis. We should be asking ourselves: Where are the 298,000 annual district court filings coming from? Why has that annual number increased by 100,000 (51%) in just five years?

The general answer is that these cases are for the most part brought pursuant to some federal statute -- as it has been applied and interpreted by the courts. It is incumbent upon Congress to periodically review these statutes and the court decisions construing them to see if their original purposes are being fulfilled. When Congress passes a statute, it does so in the context of the existing body of laws and practices. However, over time those circumstances inevitably change as underlying legal principles evolve and as other statutes are passed. The net effect, over time, may be that a statute develops a breadth or application that is beyond or different from what Congress originally intended. Accordingly, Congress must remain aware of how this process is working and must be ready to amend these statutes when necessary. We believe that the existing federal court crisis is in part predicated on statutes that over the years have been transformed into new rights and causes of action, and that now bear little, if any, resemblance to original congressional intent or traditional causes of action.

B. Prisoner Litigation

The growth of prisoner litigation provides a good starting point. Thirty years ago, the number of suits brought by prisoners in the federal courts each year was about 1,300. Today, the annual figure is about 31,000 (11.9% of all civil cases), and the number continues to increase rapidly from year to year (a 34% increase just since 1980).

Prisoner petitions are exceptional among major categories of federal litigation. Not only are they typically frivolous (state prisoners' habeas corpus petitions, for example, result in some form of relief in only about 3% of the cases, and actual release from prison in far fewer cases), 5/ but they are

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5/ See P. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 13-15, 23-24 (Dept. of Justice 1979).

also largely unaffected by the normal disincentives to litigation. The expense of attorneys' fees and other costs -- a significant deterrent to frivolous suits in most other areas -- is largely absent, since most prisoners sue pro se and qualify for in forma pauperis status. Since litigation appeals to prisoners primarily as a legitimized form of aggression against the system and a means of relieving boredom, the normal disincentive of the stress and unpleasantness of litigation is also largely inapplicable.

Congress never authorized this flood of prisoner litigation; its growth is primarily attributable to judicial decisions. The legal basis for such suits was provided primarily in the 1950's, 1960's and 1970's when the Supreme Court expanded the federal causes of action contained in surviving fragments of Reconstruction-era legislation. This is true of both suits under 42 U.S.C. § 1983 and federal habeas corpus petitions by state prisoners, which together account for the bulk of prisoner litigation. The Supreme Court, as well as the lower courts, has suffered from the impact of this added caseload. In a recent term, 20 percent of the cases decided by the Court involved § 1983 and over 10 percent of all filings in the Court were state prisoner habeas corpus cases. 6/ I will first address possible reforms in habeas corpus.

C. Habeas Corpus Reform

Suits brought by state prisoners account for 10.2% of all civil cases in the federal courts. Of those prisoner suits, habeas corpus petitions represent a significant percentage: for 1984, 31% (8,349 out of 26,581). There is widespread support

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6/ See Justice Sandra Day O'Connor, "Comments on the Supreme Court's Workload," Delivered Before a Joint Meeting of the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, New Orleans, Louisiana, February 6, 1983, at 14 (20% of cases decided by Supreme Court in the 1981 term involved § 1983); Justice Lewis F. Powell, Address Before the A.B.A. Division of Judicial Administration, San Francisco, California, Aug. 9, 1982, at 13 n.14 (estimated 450 state prisoner habeas corpus cases filed with Supreme Court in 1981 term); see also id. at 9 n.10 ("During the 1981 Term . . . petitions for certiorari were filed in more than 30 cases by a single prisoner. Each petition . . . became a case on our docket, duplicate copies were sent to each Justice, and each of us had to make a personal decision as to the petition's merit.").

among state and federal judges for reform of this procedure by which the federal district courts in effect engage in appellate review of state criminal cases.

Under current law, a state prisoner who has exhausted state remedies may re-open his case in federal district court by applying for a writ of habeas corpus. This quasi-appellate jurisdiction of the lower federal courts over state criminal judgments has traditionally been the greatest source of friction between the federal and state judiciaries. State judges are naturally resentful of a system that allows a single federal trial judge to review and overturn the considered judgments of state appellate and supreme courts. Federal judges have expressed equally serious concerns over the thousands of frivolous petitions that are filed by state prisoners each year. The practical effect of the system is that a criminal judgment in the United States is never truly final, but is potentially subject to endless re-litigation in federal habeas corpus proceedings.

Pending Administration-supported legislation (S. 238, H.R. 1127) would reduce the number of habeas corpus petitions filed in federal court by state prisoners by setting a time limit for applications, restricting the standard of review for claims that have already been adjudicated by state courts, and tightening rules for consideration of claims not previously raised. This legislation passed the Senate, by a vote of 67 to 9, in 1984 as S. 1763. We strongly urge that these proposals be promptly enacted.

D. Section 1983 Reform

The tremendous growth in the number of actions under 42 U.S.C. § 1983 -- in both the non-prisoner and prisoner contexts -- also demands congressional scrutiny. In 1960, only 280 suits filed in federal district courts were characterized as "civil rights" actions. We have estimated that for reporting year 1984 § 1983 suits alone accounted for about 28,000 cases in the district courts (about 10% of all civil cases).

Section 1983 was enacted in 1871 as a direct response to the rise of Ku Klux Klan terrorism in the South during Reconstruction, and the general unwillingness or inability of the governments in the former Confederate States to enforce the Reconstruction-era Amendments and their implementating legislation in the face of this pervasive disorder. Originally intended as a narrow civil remedy, § 1983 has ballooned in the last two decades into a major source of federal court litigation, with a scope far beyond anything Congress contemplated in 1871. The 1,492 pages of annotations under 42 U.S.C.A. § 1983 (1981) reflect the enormous range of state and local activity that is now the subject of litigation under § 1983.

The dramatic increase in the scope of § 1983 is the result of several judicial decisions. First, the Supreme Court has held that § 1983 applies to the actions of state officers even where the actions are unsupported by state law, custom and usage and where adequate state law remedies exist. 7/ Thus, § 1983 now covers many wrongs previously actionable only in state tort suits. Second, the Court has held that municipalities are "persons" subject to suit under § 1983 and that a municipality has no "good faith" defense to § 1983 actions. 8/ Third, the Court has construed § 1983 as applicable to federal statutory rights having nothing to do with civil rights or equal protection. 9/ Fourth, the Court has said that even negligently caused injuries may be encompassed by § 1983. 10/ Finally, because exhaustion of state administrative remedies is not a prerequisite to bringing suit under § 1983, 11/ individuals and municipalities often are not given the chance of resolving disputes before cases are filed in federal court.

7/ See Monroe v. Pape, 365 U.S. 167 (1961). But see id. at 225-36 (Frankfurter, J., dissenting) (legislative history shows that § 1983 was not meant to reach acts subject to state remediation).

8/ See Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978), overruling in part Monroe v. Pape, 365 U.S. 167 (1961); Owen v. City of Independence, 445 U.S. 622 (1980).

9/ Maine v. Thiboutot, 448 U.S. 1 (1980).

10/ See Parratt v. Taylor, 451 U.S. 527 (1981).

11/ Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982).

Significant § 1983 reform would certainly reduce the large number of generally spurious claims that are now brought under that section. We urge that Congress consider the following possible reforms to § 1983:

Eliminate § 1983 as a basis for prisoner petitions. This would eliminate a solid majority of § 1983 cases, most of which are frivolous: we estimate that 18,000 (64%) of the approximately 28,000 § 1983 suits filed in 1984 were prisoner suits. It would leave state remedies and a federal remedy under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq*.

Eliminate § 1983 as a basis for negligence claims. The Supreme Court in *Parratt v. Taylor*, 451 U.S. 527 (1981), suggested that a defendant's negligence may amount to a constitutional violation actionable under § 1983. Section 1983 could be amended to preclude liability for negligent acts committed by state or local officials. Alternatively, a higher standard -- *e.g.*, willfulness or recklessness -- could be imposed, since accidents committed by officials are not a proper target of the civil rights laws.

Eliminate § 1983 suits for claims arising under federal statutes not relating to civil rights or equal protection. This would limit § 1983 to claims arising under the Constitution or under federal statutes relating to equal rights, consistent with the original intent of this Reconstruction-era statute, as discussed above.

Provide a good faith defense for municipalities. In *Owen v. City of Independence*, 445 U.S. 622 (1980), the Supreme Court ruled that a municipality is absolutely liable under § 1983 for its constitutional violations regardless of the good faith of its officers. As the dissenting opinion made clear, this conclusion is inconsistent with both the legislative history of § 1983 and Supreme Court precedent. In addition, the rationale that municipal liability will deter constitutional violations is inapposite where the municipality is acting in good faith, even if a court subsequently rules its conduct unlawful. This reform would provide municipalities with the good faith defense now enjoyed by their employees. Since municipalities are liable only for official policies or governmental customs that violate federal law, this would largely protect them from retroactive changes in the law and novel claims.

Prohibit punitive damages, or restrict them to truly egregious cases. In Smith v. Wade, 461 U.S. 30, 56 (1983), the Supreme Court suggested that punitive damages are available in a "proper" § 1983 action and that punitive damages may be awarded in such cases "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." As a matter of policy, punitive damages seem out of place in this sort of litigation. The effect of potential punitive damage awards in intimidating public officials in the performance of their duties may outweigh any value they have in deterring constitutional violations. Moreover, the availability of such damages creates an incentive for increased litigation that may impair the ability of the federal courts to address claims that are meritorious. At the very least, punitive damages should only be available upon a showing of improper motive, as suggested by the dissenters in Wade.

Require exhaustion of state administrative remedies. Requiring exhaustion of state administrative remedies would be consistent with the aims of § 1983 identified by the Supreme Court in Monroe v. Pape, 365 U.S. 167, 173-74 (1961): (1) to override certain kinds of state laws that are inconsistent with federal law; (2) to provide a federal remedy where the state law is inadequate; and (3) to provide a federal remedy where an adequate state remedy is available in theory but not in practice. Administrative exhaustion is the rule in most other situations where a complaint is made against state action, including habeas corpus cases. At most it would postpone the plaintiff's access to a federal forum -- and it might eliminate the need for recourse to that forum in a substantial proportion of cases.

Require exhaustion of state judicial remedies. Given the increasingly high caliber of the state judiciaries in providing remedies for violations of state and federal law, Congress should also consider requiring plaintiffs first to pursue their cases through the state court system. This would most likely provide relief in meritorious cases without any need for resort to the federal courts. Indeed, because state judicial decisions have res judicata and collateral estoppel effect, 12/ plaintiffs would be able to invoke federal court jurisdiction under § 1983 only by showing the absence of an effective remedy under state law (i.e., lack of a comparable state law remedy and lack of state court jurisdiction over § 1983 claims) or the lack of a full and fair hearing in state court. This would achieve the greatest reduction in case filings and would be consistent with the intent of Congress in 1871 to provide a federal remedy only where justice had broken down in state systems.

Incorporate the Administration's attorneys' fee cap proposal. Section 1983 plaintiffs who prevail in litigation are entitled to attorneys' fees under 42 U.S.C. § 1988. Unfortunately, as with other fee-shifting statutes, § 1988 provides no statutory standards governing the allowability or amount of fee awards. This results, first, in an increasing incidence of inordinately high attorneys' fees awards through the use of high hourly rates, multipliers, bonuses and other means, which encourages costly and often meritless litigation. Another concern, somewhat related to the first, is the great disparity in awards, which at times borders on the irrational. Perhaps the greatest concern is the growing burden on the courts and litigants imposed by a system in which the rules are unclear and the parties are encouraged to engage in expensive litigation of attorneys' fees issues rather than enter into prompt and inexpensive settlement agreements.

These concerns go far beyond the confines of § 1983, for Congress has enacted well over 100 fee-shifting statutes. To remedy the problems we have observed with all of these various statutes, we believe Congress should impose a $75 per hour fee cap for attorney compensation in litigation under all fee-shifting statutes. Congress should also preclude the use of bonuses and

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12/ Allen v. McCurry, 449 U.S. 90 (1980).

multipliers to augment an award of attorneys' fees under § 1988. Finally, § 1988 should be changed to require specifically (1) that fees may be awarded only for work on issues on which a party prevails on the merits; (2) that fees may be allowed only if the work for which a fee award is sought is necessary to resolve the controversy and the narrow statutory scheme at issue does not preclude an award of attorneys' fees; and (3) that the services for which fees are sought must not be excessive, redundant or otherwise unnecessary.

To implement these recommendations, the Administration has proposed the Legal Fees Equity Act (S. 1580, H.R. 3181), which has already been the subject of hearings before the Senate Judiciary Subcommittee on the Constitution.

E. Social Security Court

There has been broad interest and support in recent years for the creation of an Article I Social Security Court with nationwide jurisdiction to assume the reviewing function in Social Security cases that is currently carried out by the district courts.

Such a reform would bring about a major reduction in the caseload of the Article III courts. The volume of Social Security Act cases has been increasing astronomically: in just five years (1980-1984) it has increased 232%, from 9,043 to 29,985 (11.5% of all civil cases). Under the proposal, these cases would be handled instead by a Social Security Court. The proposed reform would not only reduce the district court caseload but would also significantly further the objective of nationally uniform interpretations of federal law, the same objective that the Intercircuit Panel proposal seeks to promote.

F. Diversity Jurisdiction

Limiting federal diversity jurisdiction would be a particularly effective means of relieving the federal caseload problem. In 1984, diversity jurisdiction accounted for 57,000 new cases. In recent years, diversity cases have generally accounted for about 25 percent of all civil filings, 40 percent of all civil trials, and 60 percent of all civil jury trials in the federal courts. The magnitude of the diversity caseload affects appellate courts as well: about 15 percent of all appeals of district court decisions arise in diversity cases.

While a persuasive case can be made for the elimination of diversity jurisdiction, 13/ reforms short of abolition should also be considered. For example, the historical concerns over bias by state judges and jurors against persons from other states cannot in any way justify allowing in-state plaintiffs the choice of a federal forum. The narrow statutory definition of corporate citizenship allows corporate plaintiffs and defendants to secure federal jurisdiction even where they are licensed to do business in a given state. The current $10,000 minimum amount in controversy was adopted to ensure that minor cases would not find their way into federal court. That minimum, however, was adopted in 1958 and inflation over the past 27 years has gradually lowered the effective threshold by 70%. Finally, whole classes of cases, such as automobile accident cases, are the kinds of cases that state court systems have been able to handle without any evidence of bias or unfairness. These cases should be totally eliminated from the federal docket, just as we now exclude other significant classes of state cases -- such as domestic relations cases -- from federal diversity jurisdiction.

Accordingly, we would propose the following diversity reforms:

- Increase the amount in controversy requirement from the current $10,000 to $35,000 (which would account for inflation since the last increase), or to $100,000 or $250,000.
- Deny diversity to in-state plaintiffs.
- Eliminate diversity for auto accident cases.
- Reduce the number of cases by treating corporations as citizens of states where they are licensed to do business.

G. Supreme Court Mandatory Appeals

While the Supreme Court's review jurisdiction has become predominantly discretionary over the past century, statutes remain that require the Court to review any case within

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13/ See, e.g., Letter of Assistant Attorney General Robert A. McConnell to Honorable Robert W. Kastenmeier Concerning H.R. 3689-3693 (June 11, 1984).

broadly defined mandatory appeal categories. The Department of Justice has long supported legislation that would make the Court's docket wholly discretionary, except for direct appeals from three-judge district court panels. 18/ The Court would thereby be relieved of the unnecessary burden of deciding mandatory appeals that do not raise issues of great intrinsic importance and that would not have been granted review if presented in petitions for certiorari.

In the 1983 Term, for example, about 25 appeals set for oral argument would have been eligible for review only by certiorari under this reform. There is no means of determining precisely how many of these cases would have been accepted for discretionary review. However, the Justices have stated that they often find it necessary to call for full briefing and oral argument in mandatory appeal cases of no general public importance on account of the complexity of the legal questions presented. 19/ Since such cases would simply be denied review if presented on certiorari, it is clear that this reform would be of significant value in reducing the Supreme Court's workload, though surely not by itself sufficient to resolve the workload problem.

4. Other Judicial Workload Reduction Proposals

S. 645 in the 98th Congress included two other reform proposals that we have endorsed, and which are strongly supported by the Chief Justice. First, the Chief Justice has proposed that he be authorized to designate a judge to assist him in the administration of the judicial branch. The judge so designated would give up normal judicial duties for a number of years and carry out any administrative functions delegated by the Chief Justice. We support this proposal. We would point out, however,

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18/ See, e.g., Letter of Assistant Attorney General Robert A. McConnell to Honorable Peter W. Rodino Concerning H.R. 1968 (September 15, 1983).

19/ See Mandatory Appellate Jurisdiction of the Supreme Court -- Abolition of Civil Priorities -- Jury Selection: Hearing on H.R. 2406, H.R. 4395 and H.R. 4396 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 20-26 (1981) (Letter of the Justices to Chairman Kastenmeier).

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and the lower federal courts be addressed by a broad-based set of reforms.

To do that, Congress must revisit the statutes that have fostered the current litigation explosion. We have today put forth a package of possible court reforms. They include completing the evolution of the Supreme Court's jurisdiction toward discretionary review, limiting diversity jurisdiction, addressing the problem of state prisoner petitions, Section 1983 reform, and establishing an Article I Social Security Court. We believe that these reforms would go a long way toward eliminating the underlying cause of the Supreme Court's caseload crisis -- the burgeoning federal caseload. Therefore, we could endorse the Intercircuit Panel proposal only if Congress makes substantial reforms in these areas. These reforms should be tried before, or at least at the same time as, a structural change of possibly major magnitude like creation of an Intercircuit Panel.

The long and the short of it is that Congress can revisit these statutes now or it can do it later. But we simply cannot continue to live indefinitely with a federal caseload that doubles in less than a decade. Makeshift solutions like creating new courts or new judgeships -- without attention to the underlying causes of the court overload -- only postpone the inevitable. We strongly urge Congress to take action now.

That concludes my prepared statement, Mr. Chairman. I would be happy to answer any questions you and other members of the subcommittee may have.

Senator East. Thank you, Mr. Spears. We appreciate your comments.

I would like to ask you just one question, if I might, and then I will turn to Senator Heflin.

S. 704, as you know, states that "any case" could be referred by the Supreme Court to the intercircuit panel.

What would be the position of the Justice Department, if the statute expressly stated that only circuit conflict cases might be so referred?

Mr. Spears. I think we would be supportive of that. I would like to reserve final judgment, but it seems to us that the utility of the intercircuit panel, to the extent it has a utility, is dealing with intercircuit conflicts.

That is its fundamental purpose, and if Congress were to restrict it, the Senate were to restrict that in terms of its consideration of S. 704, I doubt very seriously if the Department of Justice would have any objections. If it has any utility, that is where it is.

Senator EAST. Thank you. Senator Heflin.

Senator HEFLIN. I have read your testimony and I suppose basically, instead of a statement on this issue, it is a blueprint for the administration as to what needs to be done. I agree that your plan could fall under the category of helping to eliminate some of the Federal issues and Federal problems that we face.

You basically, though, speak about the criticisms against the proposal. Well, I do not know: You say, in effect, that these are the opponents' criticisms, maybe not yours. But it says, "devote too much time to constitutional questions and thus, overconstitutionalize the law."

In the event that appointments are made to the Supreme Court—people are older and new appointments will be made—do you feel that the Supreme Court, if changes were to occur in the future, should not spend a great deal of time on constitutional questions, and that this might tend to overconstitutionalize the law, if the pendulum were to swing back on some of the constitutional issues that might be before the Court at that time?

Mr. SPEARS. Senator, again let me reiterate: Those are what the opponents have suggested. We think that that is an issue that has been raised and one that should be considered: I am not one who would agree that conflicts have no spot before the Supreme Court. Indeed, I think it is important to keep those conflicts there, and it is important for the Supreme Court to finally resolve those conflicts. Pulling those conflicts out of the Supreme Court's jurisdiction would leave it with a little bit different kind of structure, and different kind of flavor there.

I think the fundamental point of our testimony is, I do not think any of us can sit here with a great deal of precise foresight and identify exactly what this would do in terms of resolving conflicts, or how the Court would exercise its discretion in referring cases to the intercircuit panel. We do not know exactly what it is going to look like.

Our fundamental point is that we are ready to consider it, if it is part of a broad-based approach to resolving our caseload problems generally, and so that we can take a look at it in 5 years and see what it looks like.

I think that the issues and the arguments go every way. A lot of it is going to turn upon what this body, the Congress, elects to give the intercircuit tribunal as its jurisdiction and then what cases the Supreme Court elects to refer to it.

Senator HEFLIN. Well, for example, I believe since I first came to the Senate, we have introduced in each Congress a bill which would eliminate mandatory jurisdiction of the Supreme Court, but we do not get anywhere with it, and basically, I think it is—rather than an issue that is determined on the merits from the structural basis of the administration of justice—that politics gets into it.

And it has been my observation, on my side, and, on the other side of the aisle, that things are looked at from a political perspective rather than from the perspective of what could help the structure of courts.

I have also introduced a study commission bill that has been introduced a number of times, but there are certain members of the Supreme Court, if they advocate something, there are automatically, from a political viewpoint, some people that are going to oppose anything that that person might advocate.

And they do not look at the merits; it is just strictly a question of politics, from a viewpoint of Court politics, and that sort of thing.

I do not know whether we will ever get this mandatory jurisdiction bill, but if we do not, then the issue is, there are a lot of "frivolous matters" that the Court should not have to spend their time on.

And if you had a intercircuit panel, then they could determine those mandatory matters, but, I really, after 7 years up here, I am afraid that there are not too many people who look at the courts from the viewpoint of how the administration of justice can be improved, but rather, what are the politics of it? Well, how do the civil rights issues arise in this thing? Either pro or con, one way or the other, and, I think, decisions are made relative to internal improvements in the court system on extraneous matters, on the substantive matters that the court decides, rather than trying to improve the structure in the courts and the administration of justice.

Mr. SPEARS. Yes, sir. That has unfortunately characterized this debate from the outset. With your experience on the bench, Senator, and my experience as a litigator, I think we have probably seen a little bit more, at close hand, exactly what kind of cases roll in and what kind of cases are there, where the problem comes in terms of the docket load, and what kind of cases warrant Federal court consideration, or Supreme Court consideration.

I think that one of the solutions here is to have the members speak frankly with the district court and circuit court judges in their home jurisdictions, to find out what they think of these kinds of cases.

I have spoken to them, frankly, as we have prepared our testimony and developed our positions here, and these are the kinds of things that they are saying: "Look. Why are we doing this? Why am I sitting here in the context of section 1983, deciding whether it's appropriate for the city of Park City, UT, to tow away somebody's car that's illegally parked? Why is that before a Federal district court?"

I think it is important, if we are ever going to get over this hump, to step beyond those issues and go down to the root causes of this problem, in the Supreme Court and in the appellate and district courts as well.

I agree with you, and the reform that you suggested, the very simple, fairly straightforward one of doing away with mandatory jurisdiction and allowing the court to take cases at its discretion, is a laudable one. As you know, the Department has always supported you on that and we are going to continue pushing for it.

Senator HEFLIN. That is all. Thank you.

Senator EAST. Thank you, Mr. Spears. We appreciate your testimony, as I have indicated. I would like now, please, if the Honorable Ralph Winter, circuit judge of the U.S. Court of Appeals for the Second Circuit and also a part-time instructor at Yale Law School, would share his thoughts with us on this matter.

STATEMENT OF HON. RALPH K. WINTER, CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

Judge Winter. Thank you, Mr. Chairman.

I want to thank the subcommittee for the invitation to appear and testify with regard to this bill.

Although S. 704 is treated by its proponents as a relatively noncontroversial reform of a procedural nature, many others believe it constitutes a radical and quite undesirable restructuring of the judicial branch.

Indeed, there is widespread opposition to it among the Federal judiciary. In 1983, all of the active judges of my court who were appointed by every President since President Eisenhower, expressed by a formal vote their unanimous opposition to similar legislation then pending before the Congress.

Although I speak only for myself today, I hope the subcommittee will consider this expression of opposition as a reason for examining this legislation very closely and will not act precipitously upon the quite erroneous assumption that S. 704 represents a consensus among the Federal judiciary.

There are few Federal judges who do not favor the enactment of reforms which will ease the burden of the caseload in the Federal courts and increase the efficiency of the judicial branch. However, an ill-considered reform may simply aggravate this pressing problem and create yet new problems as well.

In my view, S. 704 has the potential for bringing about just such undesirable results.

For example, the principal reason mentioned, when it was introduced, in justification of S. 704, is that it would alleviate the burden on the Supreme Court of its enormous caseload.

However, little explanation of how it will bring about this desirable result is given. Analysis of the bill strongly suggests that S. 704 will lead not to less work for the court but more.

If we consider how it works in practice, the Supreme Court presently faces thousands of petitions for certiorari. Because they come directly to the Court, it must decide which petitions to refer to the intercircuit panel.

After a petition for certiorari has been referred, the panel does not have the power to screen the petition and to recommend that a particular case be decided by the Supreme Court.

The panel can only deny certiorari, or grant it and decide the case itself. In all likelihood, the Supreme Court will refer certiorari petitions to the panel in one of two ways. First, it may automatically refer to the panel petitions in certain classes of case, for example, prisoner petitions. This referral might be based on an internal understanding among a majority of the justices, that the panel's action in the cases in this class will not be disturbed in a postreferral petition for certiorari.

Such an understanding is necessary if the Court's workload is to be reduced, because otherwise, the Court will have to consider seriously all postreferral certiorari petitions as well as screen the initial petitions.

Note how fragile this understanding is, however. Under the Court's present rules, a vote of only four Justices is sufficient to grant a writ of certiorari. An informal understanding to leave a certain class of cases entirely to the panel thus requires that a majority of six Justices fully agree that all cases in that class are not worthy of Supreme Court review.

A majority of five will be inadequate because four Justices can presently cause a writ of certiorari to be granted, and thus trigger review of the intercircuit panel's actions.

One may question how likely it is that a majority of six can be formed and stably maintained for any length of time. More importantly, one may question why, if such a majority can be formed and stably maintained, the intercircuit panel is necessary. If six Justices agree that certain classes of cases are unworthy of review, they need do no more than screen out such petitions and deny certiorari.

A second approach might also be used by the Court. It might give initial consideration to all the certiorari petitions emanating from State and Federal courts.

In the course of that screening it will grant certiorari in some cases and decide them on the merits. Another group of cases will then be referred to the intercircuit panel for action. These will presumably be certiorari petitions with colorable merit.

A third group of certiorari petitions will simply be denied and no further action taken. At this point the effect of S. 704 will be to leave the Supreme Court with about the workload it has now. However, matters do not end there.

Any case referred to the intercircuit panel may be brought back again to the Supreme Court, which must then either decide to grant certiorari or to deny it.

In cases in which the intercircuit panel has denied certiorari, the Court will have to do some minimal screening to be sure that the panel is performing according to its wishes.

Where the intercircuit panel has decided a case on the merits, the Court must decide whether it agrees with that decision, and if not, whether it will grant certiorari and render a decision of its own.

The reality is, therefore, that for a year or a year and a half after the intercircuit panel comes into existence, the Supreme Court will have a reduced workload.

However, once the panel begins rendering decisions in earnest, the Supreme Court will have to consider all of the certiorari petitions it now faces, and yet another body of certiorari petitions from the intercircuit panel. The numbers will go up and the line on the graph will continue upward.

There is a real danger, moreover, that a substantial number of cases, decided on the merits by the panel, will then be reviewed on the merits by the Supreme Court, a result which, under any view, is a waste of judicial resources.

I stress there is a real danger of this happening. Justices of the Supreme Court are not typically indifferent to the merits of legal rules, and it is inevitable that there will be many occasions when some want to grant certiorari in cases decided by the panel.

Remember again, it takes only four votes to grant certiorari in a case. This means that if a case is referred to the intercircuit panel by a 5-to-4 vote, further view in the Supreme Court will automatically occur, if the dissenting four vote to grant certiorari after the panel decision.

These dangers can be reduced if the Court were to change its rules, so that five, rather than four votes, were needed to grant certiorari.

However, if such a change were made—as indeed, many have recommended—the caseload of the Court would be substantially reduced by that act alone, and the principal justification for creating the intercircuit panel would evaporate.

There are undoubtedly other scenarios, but the undeniable fact is that S. 704 does not curb resort by litigants to the Supreme Court. Indeed, it allows some to go there twice.

S. 704 may thus well be the kind of reform which so aggravates a problem that even more drastic measures become imperative.

I turn now to the question of conflicts between the circuits and the allegation that they exist in such numbers that the Supreme Court cannot resolve them.

I am told, although I confess I have not studied the matter, that a substantial number of these conflicts are in tax and patent law.

The problem of conflicts with regard to patents has been taken care of by the creation of the Federal circuit, and similar action could be taken to resolve the problem with regard to tax law. Beyond that, one should not overestimate the actual number of conflicts between the circuits. While the language of many cases appears to be in conflict, the actual decisions are often distinguishable on the facts, and it is by no means certain that if the differing circuits were confronted by the same facts, the apparent conflict would persist.

It is also the case, that the failure to resolve conflicts between the circuits immediately aids rather than impedes the development of a coherent and informed body of law.

Where a conflict on a particular issue exists over a period of time, courts of appeals opinions tend to discuss the matter in greater and greater depth.

So too, legal scholars are given an opportunity to write upon the subject, and actual experience with the differing rules may be measured.

These developments are likely to be a significant aid in determining the correct resolution of the conflict.

Moreover, a rotating panel of circuit judges is not an appropriate instrument for resolving conflicts among the circuits.

The lack of a long-run constancy of personnel will lead to a body of law with internal inconsistencies, as new judges attempt to avoid the decisions of departed members by distinguishing precedents. New conflicts among the circuits may then develop over the meanings of decisions of the intercircuit panel. Finally, most conflicts among the circuits involve matters of statutory interpretation.

Congress also has a responsibility to address such conflicts. I would recommend that Congress consider establishing—as have many States—a law revision commission to address problems of interpretation, including conflicts among the circuits arising under Federal statutes.

The work of such a Commission might well reduce the number of outstanding conflicts and provide solutions reflecting the will of the body with legislative power.

My main concern, and the principal reason for my personl opposition, however, is that the intercircuit panel will have profound ramifications which have not been addressed.

Certainly, one effect of S. 704 will be to alter the subject matter of the cases decided by the Supreme Court. The ability of the Court to refer cases to the panel will almost certainly lead the Court to continue to hear about the same number of cases, but with more choice as to the subject matter.

The likelihood is that the intercircuit panel will deal largely with matters involving the interpretation of lesser known Federal statutes, admiralty jurisdiction, administrative law and procedural issues.

The Supreme Court, on the other hand, will likely take either cases involving major statutes, which allow considerable latitude for judicial lawmaking, or cases which raise issues of constitutional law.

Because the Court need no longer accept the responsibility of final decision with regard to vast areas of Federal law, that make up the dockets of lower Federal courts, the Supreme Court will be free to turn from the judicial role of dispute settler to that of philosopher king.

The transformation of the Supreme Court from the court of general jurisdiction with general responsibility for reviewing the work of the lower Federal courts, to a court free to seek out new areas in which to make policy declarations, will drastically affect the development of American law.

It will almost surely accelerate the expansion of judicial power and the trend toward the constitutionalization of every perceived problem.

In the end, the Court will do as much work and decide about as many cases as it does now, but will exert less self-discipline with regard to the kind of judge-made law that it creates.

It is for this reason that I believe S. 704 proposes a radical restructuring of the judicial branch and is illusory as a method of reducing the workload of the Supreme Court. That concludes my statement.

[Prepared statement follows:]

PREPARED STATEMENT OF RALPH K. WINTER

My name is Ralph Winter. I am a United States Circuit Judge serving on the United States Court of Appeals for the Second Circuit. Prior to entering judicial service, I was William K. Townsend Professor of Law at Yale University.

I want to thank the Subcommittee for its invitation to appear and to testify with regard to S. 704. Although S. 704 is treated by its proponents as a relatively non-controversial reform of a procedural nature, many others believe it constitutes a radical and quite undesirable restructuring of the judicial branch.

Indeed, there is widespread opposition to it among the federal judiciary. In 1983, the active judges of my court expressed by a formal vote their unanimous opposition to similar legislation then pending before the Congress. Although I speak only for myself today, I hope the Subcommittee will consider this expression of opposition as a reason for examining this legislation very closely and will not act precipitously upon the quite erroneous assumption that S. 704 represents a consensus among the federal judiciary.

There are few federal judges who do not favor the enactment of reforms which will ease the burden of the caseload of the federal courts and increase the efficiency of the judicial branch. However, an ill-considered reform may simply aggravate this pressing problem and create yet new problems as well. In my view, S. 704 has the potential for bringing about just such undesirable results.

For example, the principal reason offered in justification of S. 704 is that it will alleviate the burden on the Supreme Court of its enormous caseload. However, little explanation of how S. 704 will actually bring about this desirable result is given. Analysis of that bill strongly suggests that S. 704 will not lead to less work for that Court. In fact, it may lead to more.

Consider how S. 704 might work in practice. The Supreme Court presently faces thousands of petitions for certiorari. Because they come directly to the Court, it must decide which petitions to refer to the Intercircuit Panel. After a petition for certiorari has been referred, the Intercircuit Panel does not have the power to screen the petition and to recommend that the particular case be decided by the Supreme Court. The Panel can only deny certiorari or grant it and decide the case itself.

In all likelihood, the Supreme Court will refer certiorari petitions to the Panel in one of two ways. First, it may automatically refer to the Panel petitions in certain classes of cases, e.g., prisoners' petitions. This referral might be based on an internal understanding among a majority of the Justices that the Panel's action in the cases in this class will not be disturbed in a post-referral petition for certiorari. Such an understanding is necessary if the Court's workload is to be reduced, because otherwise the Court will have to consider seriously all post-referral certiorari petitions as well as screen the initial petitions.

Note how fragile this understanding is, however. Under the Court's present rules, a vote of only four Justices is sufficient to grant a writ of certiorari. An informal understanding to leave a certain class of cases entirely to the Panel thus requires that a majority of six Justices fully agree that all cases in that class are not worthy of Supreme Court review. A majority of five will be inadequate because four Justices can presently cause a writ of certiorari to be granted and thus trigger review of the Intercircuit Panel's actions. One may question how likely it is that a majority of six can be formed and stably maintained for any length of time. More importantly, one may question why, if such a majority can be formed and stably maintained, the Intercircuit Panel is necessary. If six Justices agree that certain classes of cases are unworthy of review by the Court, they need do more than screen out such petitions and simply deny certiorari.

A second approach might also be used. The Supreme Court might give initial consideration to all the certiorari petitions emanating from state and federal courts. In the course of that screening, it will grant certiorari in some cases and decide them on the merits. Another group of cases will then be referred to the Intercircuit Panel for action. These will presumably be certiorari petitions with colorable merit. A third group of certiorari petitions will simply be denied, and no further action taken. At this point the effect of S. 704 will be to leave the Supreme Court with about the workload it has now.

However, matters do not end there. Any case referred to the Intercircuit Panel may be brought back again to the Supreme Court which must then decide either to grant certiorari or to deny it. In cases in which the Intercircuit Panel has denied certiorari, the Court will have to do some minimal screening to be sure that the Panel is performing according to its wishes. Where the Intercircuit Panel has decided a case on the merits, the Court must decide whether it agrees with the decision and, if not, whether it will grant certiorari and render a decision of its own.

The reality is, therefore, that for a year or a year and one-half after the Intercircuit Panel comes into existence, the Supreme Court will have a reduced workload. However, once the Panel begins rendering decisions in earnest, the Supreme Court will have to consider all of the certiorari petitions it now faces and yet another body of certiorari petitions from the Intercircuit Panel.

There is a real danger moreover, that a substantial number of cases decided on the merits by the Intercircuit Panel will then be reviewed on the merits by the Supreme Court, a result that under any view is a waste of judicial resources. I stress there is a real danger of this happening. Justices of the Supreme Court are not typically indifferent to the merits of legal rules, and it is inevitable that there will be many occasions where some want to grant certiorari in cases decided by the Intercircuit Panel. Remember, again, it takes only four votes to grant certiorari in a case. This means that if a case is referred to the Intercircuit Panel by a 5-4 vote, further review in the Supreme Court will automatically occur if the dissenting four vote to grant certiorari after the Panel decision.

These dangers can be reduced if the Court were to change its rules so that five rather than four votes were needed to grant certiorari. However, if such a change were made, as indeed many have recommended, the caseload of the Court would be substantially reduced by that act alone, and the principal justification for creating the Intercircuit Panel would evaporate.

There are undoubtedly other scenarios. But the undeniable fact is that S. 704 does not curb resort by litigants to the Supreme Court. Instead, it allows some to go there twice. S. 704 may well thus be the kind of reform which so aggravates a problem that even more drastic measures become imperative.

Some have also argued that the Intercircuit Panel is necessary because conflicts between the circuits exist in such numbers that the Supreme Court cannot resolve them. I am told, although I confess that I have not studied the matter, that a substantial number of these conflicts are in tax and patent law. The problem of conflicts with regard to patents has been reformed by the creation of the Federal Circuit, and similar action could be taken to resolve the problem with regard to tax law.

Beyond that, one should not overestimate the actual number of conflicts between the circuits. While the language of many cases appears to be in conflict, the actual decisions are often distinguishable on the facts, and it is by no means certain that if the differing circuits were confronted by the same facts, the apparent conflict would persist.

It is also the case that the failure to resolve conflicts between the circuits immediately aids rather than impedes the development of a coherent and informed body of law. Where a conflict on a particular issue exists over a period of time, courts of appeals opinions tend to discuss the matter in greater and greater depth. So too, legal scholars are given an opportunity to write upon the subject, and actual experience with the differing rules may be measured. These developments are likely to be a significant aid in determining the correct resolution of the conflict.

Moreover, a rotating panel of circuit judges is not an appropriate instrument for resolving conflicts among the circuits. The lack of long run constancy of personnel will lead to a body of law with internal inconsistencies as new judges attempt to avoid the decisions of departed members by distinguishing precedents. New conflicts among the circuits may then develop over the meanings of decisions of the Intercircuit Panel.

Finally, most conflicts among the circuits involve matters of statutory interpretation. Congress also has a responsibility to address such conflicts. I would recommend that Congress establish, as have many states, a law revision commission to address problems of interpretation, including conflicts among the circuits, arising under federal statutes. The work of such a commission might well reduce the number of outstanding conflicts and provide solutions reflecting the will of the body with legislative power.

My main concern and the principal reason for my opposition, however, is that the Intercircuit Panel will have profound ramifications which have not been addressed. Certainly, the effect of S. 704 will be to alter the subject matter of the cases decided by the Supreme Court. The ability of the Court to refer cases to the Panel will almost certainly lead the Court to continue to hear about the same number of cases but with more choice as to the subject matter.

The likelihood is that the Intercircuit Panel will deal largely with matters involving the interpretation of lesser known federal statutes, admiralty jurisdiction, administrative law, and procedural issues. The Supreme Court, on the other hand, will likely take either cases involving major statutes which allow considerable latitude for judicial lawmaking or cases which raise issues of constitutional law. Because the Court need no longer accept the responsibility of final decision with regard to vast areas of federal law that make up the bulk of lower federal courts, the Court will be even more free to turn from the judicial role of dispute settler to that of philosopher king. The transformation of the Supreme Court from a court of general jurisdiction with general responsibility for correcting the work of the lower federal courts to a court free to pick out the areas in which to make major policy declarations will drastically affect the development of American law. It will almost surely accelerate the expansion of judicial power and the trend toward the constitutionalization of every perceived problem. In the end, the Court will do as much work and decide about as many cases as it does now but will exert even less self-discipline with regard to the kind of judge-made law it creates. It is for this reason that I believe that S. 704 proposes a radical restructuring of the judicial branch and is illusory as a method of reducing the workload of the Supreme Court.

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It may well be that there is a pride of authorship in that opinion, and when certiorari is not granted by a higher court—this was true in my State—there was a sigh of relief that went from the lower appellate court level, that that was not considered, whether that has some inherent opinion as to why a lot of circuit judges are not enthusiastic about this, I do not know. That might just be a passing remark.

But I want to ask you this question. You mentioned that you think that this would increase the workload of the U.S. Supreme Court, and you say that for a year, or a year and a half, it would reduce their workload.

But then, they would have to come back and have to review these opinions. Well—one of the arguments of those in favor of creating a temporary panel on a 5-year plan would be that it would give you an opportunity to study that.

Do you think that the 5-year period would be sufficient time to make a determination of whether it would, or would not, increase the workload of the U.S. Supreme Court?

Judge **Winter**. Yes, I think you could, over a 5-year period reach the conclusion that, whether or not it had. There is nothing certain in this world. Nevertheless, it is probably a 10-to-1 chance that it will increase the workload.

First, it allows litigants to go there twice instead of once. Second, they can seek review, not just of opinions of the panel, but of denials of certiorari by the panel. So, instead of 5,000 petitions for certiorari, you may wind up with 8,000, 3,000 of which are there for the second time.

But suppose down the road, at the end of 5 years, we then discover that it has increased the workload of the Supreme Court. Then the situation is going to be worse than ever, it seems to me, and some even more drastic proposal will come along.

It seems to me you have to make a judgment now, at least on the caseload issue. The problem of conflicts between the circuits is a different issue; but at least as to caseload, you have to make your own judgment, now, as to whether it will actually alleviate the workload of the Supreme Court, and, I think if you study the matter, you will decide that it will not.

Sentor **East**. Thank you, Judge Winter. We appreciate your taking the time to be here today, and your fine contribution. At this time, we would like to have come forward a panel consisting of three judges from the U.S. Courts of Appeals for the District of Columbia Circuit.

We would appreciate it if the Honorable Patricia M. Wald, the Honorable Harry Edwards, and the Honorable Ruth Bader Ginsburg would come forward.

As I have indicated—and I know it is difficult to do—I would appreciate it if we could keep this panel discussion within the framework of 20 minutes, and I would appreciate your consideration of that request.

So, again, I welcome the three of you, and any way that you would like to proceed, we would certainly be delighted to take your thoughts.

STATEMENTS OF A PANEL CONSISTING OF HON. PATRICIA M. WALD; HON. HARRY T. EDWARDS; AND HON. RUTH BADER GINSBURG; CIRCUIT JUDGES, U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Judge WALD. Thank you, Mr. Chairman. Senator Heflin.

I think perhaps the best way to proceed would be for each of us to make a very short, couple-of-minutes statement, and then we will place ourselves at your disposal to answer questions, and so try to come in under the 20-minute time limit.

Our statements, Judge Edwards and mine, are in the record, and I will use my 3 minutes to underscore a few points.

My principal concern with the establishment of a temporary and experimental court is that it will fundamentally alter, despite its experimental label, the way the lawmaking function is now conducted in the Federal judiciary.

I do not think it is a casual experiment at all. I believe that for the first time in 200 years, we will have a fundamental change in the way national law is made.

Federal circuit judges and Federal district judges have always been appointed to sit on a particular court. Except for the District of Columbia Circuit, they are required to be residents of the circuit.

In order to keep circuit law coherent and uniform, we work very hard at monitoring the issues that eventually come up to our court.

We watch how they emanate out of different circumstances in different district courts of our circuit. We often have to go back and fine tune our rulings to accommodate to unforseen consequences.

Now, the Supreme Court has, since the beginning of the Nation, been the only Federal court of general jurisdiction that can make uniform national law in the Federal system, and it seems to me, that is the way the Constitution anticipated that the system would work.

I think when you have a group of circuit judges who are selected by a majority of the Supreme Court, and they become a "super" circuit court, which can then overrule the precedent of the circuit—circuit precedent that has been years in the making—and that comes about as a result of looking at many different opinions of many district court judges as well as the conditions in the circuit, that will represent a basic change in Federal judicial process.

Sometimes current law comes about as a result of the entire circuit court, sitting en banc. Therefore I think that the notion of an ad hoc group of judges—one from each circuit—overruling an entire circuit bench is certainly a very novel one. Like Judge Winter, I believe it will have profound effects upon circuit jurisprudence, since our precedents can be overruled by peers from other circuits who are not familiar with the particular problems in our circuit, or why our rule evolved as it did.

Obviously our court law bows to the Supreme Court, but for that very reason, every time a Supreme Court Justice is nominated, the Nation pauses, the Senate takes great care, the American Bar Association mentions the nomination. We know the momentous nature of the decisional responsibilities the new nominee will bear.

We talk, sometimes too glibly, about the problem of intercircuit conflicts, but we should remember they are not some kind of discrete breed of cases that you can neatly lop off of the jurisprudential body.

Intercircuit conflicts come in all sizes, shapes, and degrees of importance. In fact the more important the legal issue, the more likely it is to surface in more than one jurisdiction, and I think the more essential it is that it be allowed to percolate, except in the most extreme emergency cases, and eventually, if it is important enough for the Supreme Court to decide it.

My second point is that the main justification for the new tribunal is to ease the Supreme Court's present workload of 150 opinions per term.

I suggest that it will do so at the expense of the circuit court judges. I would point out, that between 1960 and 1983, the caseload of Federal appellate courts increased by 600 percent, at the same time the Supreme Court's certiorari docket went up 200 percent.

It is probably as well known to this body as to all of us in the court system, that even when we get authorization for more judges, it takes a very long time before they appear as warm bodies on the bench. We are presently operating very shorthandedly.

The administrative office tells us that the Federal circuit judges sit on an average of 255 cases a year. Most of us write well over 30 opinions a year.

I estimate the time it would take a circuit judge to sit on the intercircuit tribunal, and decide "40 cases" a year, which is the number of conflict cases often mentioned, to amount to a couple of months' work.

Clearly, for 40 important cases, it would take 2 weeks to sit on them; 2 to 3 weeks to prepare and read all the briefs; certainly, if the judge writes his or her share of those 40 opinions, even divided by 13, and leaving our concurrences or dissents, it would take another month or more of work.

So, in realistic terms, that means a minimum of 2, perhaps 3 months off of their regular circuit duties. Most of us feel that we cannot afford that loss of judge power in our own circuits. We have been operating with 2 of our 12 authorized positions vacant for a year, and recently suffered a third one.

Now my final point is that the reason most of us are where we are today is because we feel a special legitimacy, credibility, respect, and morale, about being a member of the Federal judiciary.

Senator Heflin suggested that no judge likes to have his or her opinions overruled by a higher court, and he is absolutely right. It is not a pleasant feeling. I would like to think, however, that most of us are not operating on that basis alone when we oppose the creation of a new intercircuit tribunal.

But there is no question that if we are going to be overridden, I, and I think others, would like the Supreme Court to do it. Or, if the Senate and the House want to "bite the bullet" and establish a fourth tier, Presidentially selected, senatorially confirmed tribunal to pass on our rulings that has its own constitutional legitimacy, so be it. That certainly is your call.

But there is something constitutionally untidy about handpicking a few circuit judges out of the various circuits, putting them on this supercircuit court to serve for a few years as a council of revision with respect to circuit law, while the rest of us sit with life tenure on our own particular courts.

There is no question in my mind it would create a corps of elite among the circuit judges, and that that particular form of elitism would probably carry weight in the internal deliberations of our own circuits.

Courts are cloistered but intensely intimate bodies, and the dynamics of personal prestige and influence are subtle. The creation of a "super" court composed of a "super" judge from each circuit could not but help affect intercircuit decisionmaking as well.

I will stop there. I did have many drafting problems with the bill in its present form, but I set those out in my statement. Thank you.

[Prepared statement follows:]

PREPARED STATEMENT OF PATRICIA M. WALD

Mr. Chairman, Senators: At your invitation, I would like to make the following comments on S 704, a bill to establish an intercircuit panel.

1. My principal concern is with what the establishment of a "temporary," "experimental" court, composed of 13 circuit judges, selected by the Supreme Court, with broad authority to overrule the precedents of the regular circuit courts and to establish uniform law throughout the nation, will do to the structure and workings of the federal judicial system. Both in design and in effect, such a supercircuit court will represent a fundamental change in the way national law has been made for almost 200 years. Every one of our present 618 federal judges is nominated by the President and confirmed by the Senate for a post on a particular federal court. I and my colleagues were nominated and confirmed for the District of Columbia Circuit Court; we are not fungible with nor may we (except on an emergency or very temporary basis) be freely transferred around the country to make the law in other circuits. The Supreme Court has always been the only federal court of general jurisdiction that can make uniform national law in the federal system. The Constitution conceived it that way. As circuit judges, we monitor the growth and development of jurisprudence in our own circuits--we watch legal issues emerge from our district courts in varied forms and with varied results and eventually we attempt to resolve those issues and make coherent law within our jurisdiction. When we adopt a rule of law, I assure you, we do not do so casually without knowledge of how the issue has developed in our circuit, whether district judges have split on it, what their reasoning has been, what the effects of one interpretation over another will be in our circuit—for the same rule of law may have very different effects on different circuits in terms of forum shopping, caseloads, impact, etc. When we have adopted a rule of law we watch carefully thereafter for unexpected side effects on other parts of our circuit law. Often we must go back and finetune or modify the rule to accommodate it to those unanticipated effects. And when we adopt or modify it we look carefully to

what other circuits have done. If we discern conflicts already in the circuits, or if we are about to create one, we may en banc the case, requiring all of our judges to make the choice. Right now, we are sitting on two en bancs which were convened specifically because of present or potential conflicts with other circuits. The Supreme Court, of course, still has the final say, if it wishes, over any circuit's precedent, and because of that momentous responsibility the President, the Senate, the American Bar Association and the nation focus attentively on the selection of Supreme Court Justices.

I would emphasize in that respect that intercircuit conflicts are not some kind of discrete breed of cases that can be neatly lopped off the jurisprudential body. They come in all sizes, shapes, and degrees of importance. The more important the legal issue, the more likely it is to surface in more than one jurisdiction, and the more essential it is to let several circuits deliberate on it from their sometimes unique perspectives, before it is definitively resolved by the Supreme Court. Circuit conflicts are not the quarrels of squabbling children wherein it doesn't matter who wins as long as they stop fighting. They may involve the most serious legal issues that come into our courts. It is vitally important how they are decided, not just that they are decided. In a quick handcount of 58 published opinions in our circuit in a 4 month period (January - April 1985) I found 5 cases in which circuit conflicts figured in the court's analysis. In each case, the other circuits' views were analyzed, dissected, and in most cases elaborate justifications given for our circuit's choice. The conflicts involved (1) the government's burden when it tries to show under FRCrP 404(b) "other bad acts" committed by a criminal defendant, (United States v. Lavelle, No. 84-5060, Jan. 18, 1985); (2) whether claims of interference with prospective advantage are barred from relief under the Federal Tort Claims Act (Art-Metal USA v. United States, No. 83-2243, February 12, 1985); (3) the definition of protectable concerted activity under the National Labor Relations Act (Prill v. NLRB, No. 84-1064, February 26, 1985); (4) what constitutes a final judgment for purposes of computing the appeal time limits under the Equal Access to Justice Act (Mass Union of Public Housing Tenants v. Pierce), No. 84-5152, March 1, 1985 and (5) the applicability of the

EAJA attorney fees provision to prevailing parties in Federal Power Act proceedings (Hirschey v. FERC, No. 82-2170, April 19, 1985). A final decision in any of these cases has profound legal and in some cases financial implications for our federal government and its citizens. In my view, the further review of such questions so painstakingly considered by the Court of Appeals should be undertaken only by the Supreme Court consideration.

On the other hand, Judge Richard Posner of the Seventh Circuit in his book on Federal Courts concludes that "put[ting] to one side any possible constitutional problem arising from the fact that Article III ordains the creation of one Supreme Court," "it is not so clear that the court should be resolving more intercircuit conflicts than it now hears." Indeed, Judge Posner advances the opinion that it may already be deciding too many unimportant ones. Unless a conflict involves subjecting the same person to "inconsistent legal obligations--as few intercircuit conflicts do"—Judge Posner does not rate it as intolerable, in fact believes allowing conflicts to simmer at the circuit level is presumptively a good thing.

> An issue that provokes a conflict among the circuits that is not immediately eliminated by one circuit's receding from its previous position is likely to involve a difficult legal question; and a difficult question is more likely to be answered correctly if it is allowed to engage the attention of different sets of judges deciding factually different cases that if it is answered finally by the first panel to consider it. After most circuits have spoken to a question and if the circuits are closely divided, it is then time for the Supreme Court to step in and resolve the conflict. The proposition that federal law ought to be the same everywhere in the country is not persuasive. If uniformity is desirable (as it is), so are diversity and competition. Federal law is so pervasive today that much of the role that the different states played in the past in the development of legal doctrine through competition among the courts of the differnt states must be played today, if it is to be played at all, by the federal circuits.

My first point then is that from a structural and process point of view, I am deeply skeptical that the benefits of creating a new body to decide more intercircuit conflicts will offset the costs to the integrity and credibility of the process of taking such cases out of the carefully crafted and quite sensitive federal judicial heirarchy and subjecting them to an ad hoc temporary body with unprecedented powers to overrule regular circuit law. I agree with Judge

Posner's pessimistic conclusion about what he calls the "Second Supreme Court." He posits that "the average quality of the court's decisions may be no higher than the decisions it is reviewing. . . it would cut off some conflicts prematurely, resolve others incorrectly, deflect attention from the real causes of the Supreme Court's problems, increase the workload of circuit judges and delay federal litigation." (Posner, Federal Courts, pp. 162-6)

I would add the thought that Supreme Court opinions are often tempered by the views and by the concurrences and dissents that emanate from Justices of different tempers, appointed at different times, by different Presidents. Yet this court will spring full blown as appointees of a majority of the present Supreme Court. Where will the diversity of time and circumstances come from? In the absence of the historic mix of appointees from different Presidents will the opinions of this new court be bland, monotholic, tired copies of Supreme Court majority opinions, without the intellectual ferment that dissents and differences of viewpoint bring.

2. My second point addresses the workload problem. The new tribunal is an attempt to ease the Supreme Court's workload of 150 cases a year, 40 of which are said to involve such conflicts. While I defer to Judge Posner and Professor John Sexton at New York University Law School as to whether that number needs to be so large, I am convinced that the remedy set out in S 704 has a real potential for exacerbating circuit court workload problems. Betwen 1960 and 1983, the caseload of federal appellate courts increased by 600%; in the same period the Supreme Court's certiorari docket went up over 200%; and the number of its opinions escalated from 109 to 151. That averages to 17 majority opinions per justice, a number I estimate to be substantially less than the number of opinions most court of appeals judges write each year. Indeed, according to the Administrative Office, federal circuit judges nationwide sit on an average of 255 merits cases a year. In our circuit, most judges write well over 30 opinions a year. The problems of federal judges in coping with mounting caseloads throughout the system (our filings went up 58% last year, other circuits much more), while avoiding deterioration in the quality of our decisions, and keeping the law coherent in our own circuits are real and

mounting ones. I would thus be worried about a temporary court which draws on the very limited resources of those same circuit courts for extra duty on 40 cases a year. If the extra duty judge writes his or her share of the 40 intercircuit tribunal cases (leaving aside concurrences, dissents, etc.) it still means 2 weeks sitting time and, in my experience at least another 3-4 weeks preparation time, and still another several weeks writing time. I cannot make it out at less than 2-3 months of a circuit judge's time off from his or her own circuit business. I know that our court cannot, and I doubt if any other circuit court can, spare that kind of judgepower without negative impact on the court's ability to keep pace. I note that under S 704 the circuit courts would have no say as to which judges could be tapped—thus the slow ones could fall further behind, and loss of the fast producers would take a bigger cut out of circuit productivity. Many of our circuits are already operating shorthandedly. Even when new judgeships are created they take what often seems an inordinately long time to fill. Our court has been operating for almost an entire year with 2 of our 12 authorized positions vacant. From the circuit court's point of view, the cost benefit calculations of the new tribunal are lopsided indeed.

Your bill allows senior judges to fill the slots. I remain somewhat skeptical about the wisdom of that, for the reasons I set forth in a speech to the DC Bar several years ago.

> It has been suggested that senior judges be drafted onto the new court. Although a few might be excellent choices, it is irresponsible, I believe, to have a court staffed predominantly by senior judges who no longer can vote en banc on their own court, yet in this forum can overrule every circuit court. Senior judges now contribute enormously to their circuit's output, but they are senior for a reason; they recognize their own diminishing capacities or work limits; it would be anomalous to create a super court composed primarily or even substantially from their ranks.

It is therefore with some trepidation that I see S 704 puts no limit on the number of senior judges who might be appointed, conceivably they might even make up a majority. Yet, only a few years ago, Congress acted to limit senior judges participation on en bancs of their own circuit courts and to bar more than one senior judge on a circuit panel.

3. Finally there is an even subtler worry I have about a supercourt composed of

circuit judges selected by the Supreme Court. It would undoubtedly create a corps of elite among circuit judges. Having been selected by the Supreme Court, doesn't that judge carry extra weight in all his dealings; inside his own court as well as out? Courts are cloistered but intensely intimate bodies, and the dynamics of personal prestige and influence are subtle. The creation of a supercourt composed of a superjudge from each circuit cannot help but affect intracircuit decisionmaking as well.

In my view, this kind of elevation could well have a demoralizing effect on the judges engaged overtime in the traditional lawmaking business of the circuits. If there is eventually to be another intermediary court betwen the circuits and the Supreme Court, it should at least have the legitimacy of Presidential nomination, and Senate confirmation of its members for that job. The notion of a body whose members are selected by the Supreme Court as special helpers in overseeing their colleagues, I find to be a novel and possibly mischievious one. I am old fashioned enough to think that the Supreme Court's function of declaring national law—in intercircuit conflict cases as in all others—is and should be non-delegable, at least until Congress is ready to create a duly constituted fourth tier in the federal judiciary whose members are nominated and confirmed in a constitutional fashion.

Part of the Founding Fathers' genius was the provision of life tenure to insulate judges from outside influences on their judging. Can we expect these superjudges, appointed by the Supreme Court to do their work, on a term basis, to be as immune. Are they to judge the law as they believe it should be or to predict what the higher court would do, cognizant always both of the origin of their appointment and of its temporary duration.

And indeed, it is difficult to predict just where the loyalties of judges on this new court should or would lie. Judge Joseph Sneed of the Ninth Circuit calls it a "court of clones" yet warns

> "ICP judges would not be as independent as they are at the circuit level nor as subservient as are the clerks of the Supreme Court Justices. The ICP would compromise the judicial independence of ICP judges but it would not eliminate it. The irony is that to the extent it was not eliminated would be the extent to which the ICP failed to be a proper 'helpmate.' "

In sum, I think this temporary, experimental court would profoundly affect the legitimacy and credibility of the rest of the federal judiciary; it would not be worth whatever modest reduction in the Supreme Courts docket it might bring.

4. I wish also to set out for your consideration several problems I have encountered with the details of the bill.

A. Sec. 61 Establishment of Composition of Intercirucit Panel

(1) The bill does not require that there be a representative of each Circuit on the panel. Is this to be left to the Supreme Court? Is the proportion of active and senior judges also to be left to their discretion? Does "Supreme Court" means a majority thereof, or are the Justices to pick one apiece from their respective circuits with the four remaining members picked by majority vote? How can we insure any kind of diversity or intellectual ferment on the court? Are the circuit councils to have any say as to who is selected? The Supreme Court also decides what members on the new court get 2, 3, and 5 year terms. Does this not create inside the new court itself a favored corps?

(2) The bill creates no limits on the jurisdiction of the court even though it is billed as one to establish an intercircuit tribunal. Presumably, the Supreme Court can send to it any kind of case—it could become a specialized court for administrative appeals, environmental cases, habeas corpus or disability cases whether intercirucit conflicts are involved. In effect, the Court is allowed to decide what level treatment any case now appealed to it gets. That is a formidable delegation of power. It is one thing to permit the Court to decide which cases it will hear and which cases it will leave the circuit court decisions intact, but quite another to decide those cases where it will make national law in and those where its "helpmate" court will make national law. To avoid confusion and perhaps even deception, the name of the bill should be changed, if the new court's jurisdiction is potentially so comprehensive. Judge Posner's "Second Supreme Court" sounds more accurate.

(3) Under the bill, no judge who participated in a case may sit on its appeal. Obviously this means sitting either as a panel member or on a en banc rehearing but would it cover a judge voting on an en banc motion as well? If

the latter, it would eliminate the circuit representative from a large number of cases in which his circuit was involved. Must the ICP member then recuse himself from en bancs anticipating possible conflicts that may be heard by the new tribunal, at the expense of the judge's own court's jurisprudence? We can expect litigants to take advantage of such potential conflicts by bringing even more en banc motions for circuit courts to consider. Another complication: since a number of cases from different circuits involving the same conflict may be available for referral, the case selection process itself may determine which judges on the intercircuit tribunal may participate. Thus a judge from X circuit which has taken a firm position on the conflict in a different case could sit so long as he had not sat on the specific case referred, yet he may have already declared himself judicially on the issue in another case. A dissenting judge on an issue taken up by the new court in a different case can participate even though it is clear his view did not prevail in his own circuit. In short, the bill does not begin to account for the permutation and combination of potential conflicts.

B. Section 1260 Referral to Intercircuit Panel

The Supreme Court may refer any case (state or federal) to the panel, before or after certiorari is granted or denied. By what kind of vote is the referral to be made; it takes 4 votes for certiorari but presumably 5 for referral to this court. What if 4 justices vote for certiorari, 5 for referral, which governs? This broad grant will be converted into an endless array of tactical moves by lawyers—will they be allowed to petition for referral as well as certiorari, before and after granting or denial of certiorari? If so, the Court's own work will be multiplied. If not, when they petition for certiorari, they must factor in the new possibility of referral rather than grant or denial. I predict they will rise to the occasion so that the last resort stage will be more paperridden than it is today. When the panel rules, can the lawyers again take up the cudgel asking for certiorari anew? Judge Sneed predicts the new court will delay finality of review of state court judgments, habeas and 1983 actions from federal court, and engage more petitions for certiorari from the new court—"Make no mistake about it, the achievement of greater capacity to declare national law by means of an ICP would incur the cost of delay . . . a longer period of uncertainty; to the litigants, greater out-of-pocket costs." (Appellate Judges Conference News, Vol. i, Issue 3 (1985))

C. Section 1272

The panel is a certiorari court except for so called mandatory appeals and cases the Supreme Court directs it to decide. Circuit courts have no discretionary jurisdiction—we decide every case presented to us. Yet an ad hoc temporary court not only may overrule us, but decide whether or not to sit on our cases at all. Further, the new court's discretion means it must take time to make these certiorari decisions, over and above the time involved in deciding and writing the cases it hears.

I also note with concern that constitutional and foreign affairs cases can be decided by this court, treaty law included. The Supreme Court's delicate role as the final arbitor in treaty cases should not be lightly delegated to a temporary tribunal whose membership changes yearly.

D. Section 6 Reports

I would suggest that Congress at the end of the "experiment" ask for reactions from other involved participants as well as the court itself. Lawyers whose cases were referred to it should be asked for their views of the process--whether they believed it added cost and delay or simplified the appellate process; circuit courts whose judges performed on the court should be asked how they felt about the impact of their judge's double duties.

Thank you for this opportunity to present comments on the bill, which of course represent my individual views alone.

Senator EAST. Judge Edwards.

STATEMENT OF HARRY T. EDWARDS

Judge EDWARDS. Mr. Chairman and Senator Heflin, at your invitation, I am here today to comment on S. 704, a bill to establish a new circuit, an intercircuit panel. I have already submitted a written statement and I would repectfully request that the statement be included in your record of the proceedings.

With your indulgence, I will propose only to summarize certain of the main points in my written submission, and then make myself available for any questions.

First, I am in total agreement with the written statement submitted by Judge Wald. I have serious doubts about the wisdom of creating a so-called second supreme court, as Judge Posner has called it, and I have serious doubts that such a court would reduce the workload of the Federal system for the reasons stated by Judge Winter.

But, second, even assuming that there is a workload problem at the Supreme Court—and I, frankly, am not prepared to debate that question today, I am prepared to accept the judgment of the Justices, insofar as we understand their judgment—even assuming that there is a workload problem, I think that S. 704 is a very poor prescriptive measure.

Indeed, I feel that it is terribly shortsighted and likely to create substantially more problems than it purports to cure.

There are four principal objections that I have stated, that I will simply restate now. First of all, looking at it from my perspective as a court of appeals judge—that is, the perspective that I understand—I am not prepared to challenge the Chief Justice, or other Justices who feel that they are in need of assistance–but I am prepared to suggest that I understand the court of appeals, and I do think I can anticipate some of the effect that this bill will have on us.

First of all, the bill will reduce the manpower available to the circuit courts and substantially increase the burdens on circuit judges.

As Judge Wald has already said, our caseload has increased substantially, well beyond the caseload increases of the Supreme Court, and we do not have certiorari authority. We must accept every appeal that comes to us. We must decide all cases.

In the proposed bill, you are stealing from Peter to pay Paul, and I would suggest that that is very shortsighted. That is not a terribly perceptive way to handle the problem that has been identified, assuming, indeed, that there is a workload problem.

Secondly, I would suggest to you that membership on the special panel will seriously disrupt the collegiality of the courts of appeals, and create hierarchies among formerly equal judges.

It may be difficult for some who are not among us to understand that effect, but I think that most of us anticipate that the problem will be quite serious. You cannot sit in conference with a formerly coequal colleague who is now a sometimes Assistant Supreme Court Justice, and engage in the same kind of meaningful dialog that you previously had with that colleague.

If it is imperative that we have a fourth court, I would suggest, as Judge Wald said, you "bite the bullet" and create it as another separate judicial entity, and not disrupt collegial relationships among the circuit courts of appeals.

Thirdly, I think that S. 704 will have a potential pernicious effect on intercircuit collegiality. The bill is open-ended. It does not even suggest that the Supreme Court will be required to select among the circuits on any equal basis, and it is very possible that you could have a majority of the so-called assistant supreme court justices, as I have called them, coming from certain circuits.

That will cause litigants to litigate differently than they presently do, depending upon how they perceive the hierarchy among the circuits.

Lastly, and most importantly, I think S. 704 is subject to none of our traditional political constraints on judicial selection, and, for that reason alone, it should be rejected as a possible solution to the perceived problems.

We have always selected court of appeals judges pursuant to appointment by the President and confirmation by the Senate. The reason we have done that is, whether or not it is required by the Constitution, we have understood that the jurisdiction of the court of appeals is nearly coterminous with that of the Supreme Court, and, therefore, it is important to have a political check on the appointment of appellate judges.

The jurisdiction of this proposed court under S. 704 will be exactly coterminous with that of the Supreme Court, and it seems to me there is no justification, whatsoever, that has been offered by the proponents, to explain why we would abandon a longstanding tradition of a majoritarian check on the selection of judges to so powerful a court.

I think I will stop there, given your admonition on the time, Mr. Chairman.

[Prepared statement follows:]

PREPARED STATEMENT OF HARRY T. EDWARDS

The growth of the workload of the Supreme Court has been termed "perhaps the most important single, immediate problem facing the judiciary."[1] Two prestigious national commissions have concluded that the Supreme Court's large docket of cases is incompatible with the fulfillment of its historical and essential functions. Specifically, in 1975 the Hruska Commission suggested that the Supreme Court lacked sufficient capacity to meet "the need for definitive declaration of the national law in all its facets."[2] This Commission and its predecessor, the Freund Commission, contended that the problems caused by the Court's alleged lack of capacity—including unresolved intercircuit conflicts and delays in the resolution of national law--were sufficiently serious to justify the creation of a new intermediate federal appellate court. It is from this seed that S. 704 and its still-born predecessors have sprung.

A number of scholars and other commentators have raised, what I view to be, very legitimate questions about the accuracy of the assumptions underlying the current legislative proposals to relieve the alleged workload burdens at the Supreme Court. As a federal court of appeals judge, I concede that I am not in the best position to assess the caseload of the Supreme Court.[3] I find it unnecessary to address this issue, however, because I have grave doubts about the wisdom of S. 704, and like legislative proposals, without regard to claims of excess workload. Even assuming that a problem exists, I see S. 704 as terribly short-sighted in its prescriptive measures, and likely to create more problems than it purports to cure. Since certain of these problems will have a direct impact on the federal courts of appeals, I offer my comments from that vantage point.

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[1] Burger, Annual Report on the State of the Judiciary, 69 A.B.A.J. 442 (1983).

[2] Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 9-10 (1975) (hereafter "Hruska Commission Report").

[3] To the extent that S. 704 based on the desire to relieve overburdened Supreme Court justices, I will defer to the justices on whether such a need truly exists. However, I would note that in their public statements, at least, there is no consensus among the members of the Supreme Court on the need for a new intermediate court of appeals. See, e.g., Brennan, Some Thoughts on the Supreme Court's Workload, 66 Judicature 230, 235 (1983). In Estreicher and Sexton, A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study, 59 N.Y.U.L. REV. 681 (1984), the authors state that Justices Stevens, Brennan and Marshall oppose the national court of appeals concept and that Justices White, Powell, Rehnquist, and O'Conner, as well as the Chief Justice, endorse it.

I.

As I understand the present bill, it proposes to establish an intercircuit panel composed of nine sitting and four alternate judges selected by the Supreme Court from the current pool of active circuit judges, including those with senior status. Although initial terms would vary, as a rule judges would serve three years. The bill also provides for the recusal of judges who have previously participated in a case at the court of appeals level. The intercircuit panel would have jurisdiction over any case referred to it by the Supreme Court.

Under the bill, a matter may be referred by the Supreme Court before or after granting or denying certiorari, or before or after noting probable jurisdiction of an appeal. In addition, the Court may direct the intercircuit panel to actually *decide* any case referred and may review any of the panel's decisions. Unless the Supreme Court modifies or overrules its judgments, the decisions of the intercircuit panel will create binding precedent for all lower courts of the United States. Finally, the bill bears a sunset date of five years from the first case referral to the panel.

II.

As noted above, S. 704 is subject to many of the criticisms leveled against previous plans to establish a National Court of Appeals. Commentators have suggested that the Supreme Court is not truly overburdened [4] and that, if it is, its difficulties arise because it is entertaining cases it should not hear. [5] Others assert that *intercircuit conflict* is not a neglected segment of the Court's docket and that in many such cases, the Supreme Court benefits from the percolation of a problem among the several circuits. [6] Finally, grave doubts have been expressed as to whether an intermediate circuit court would increase or decrease the burden of the Supreme Court. [7] These arguments have been thoroughly aired elsewhere, and I will not rehash them. My particular criticisms of the bill emerge from my perspective as an appellate judge and are based upon my conviction that this bill implicates profound separation-of-powers issues.

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[4] *See* Hellman, *Caseload, Conflicts, and Decisional Capacity: Does the Supreme Court Need Help?*, 67 Judicature 30-34 (June-July, 1983); Estreicher and Sexton, note 3 *supra*.

[5] *See* Estreicher and Sexton, note 3 *supra*; Stevens, *Some Thoughts on Judicial Restraint* 66 Judicature 177, 179 and *passim* (1982).

[6] *See* G. Casper and R. Posner, *The Workload of the Supreme Court* 85-92 (1976); Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?* 71 CAL. L. REV. 913, 928-29 (1983); Hellman, note 3 *supra*.

[7] *See* Estreicher and Sexton, note 3 *supra*; Alsup, *Reservations on the Proposal of the Hruska Commission*, 7 U. TOL. L. REV. 431, 450-51 (1976).

III.

Our judicial system is a highly interactive one; the proposed special panel may solve some problems for the Supreme Court while creating others at the appellate level. First, the work load of the courts of appeals is at least as heavy as that of the Supreme Court, yet S. 704 would reduce the manpower available to circuit courts and increase the burdens on circuit judges. The current situation in my own D.C. Circuit is instructive. At present we face a staggering backlog of cases, and we have three vacancies; the loss of another judge to such special duties would create further backlogs and hardship for already overburdened judges.

Second, and more important, is the likely effect of the proposal on relations among circuit judges. Regardless of what method of selection is used, membership on the special panel will disrupt the collegiality of the courts of appeals and create hierarchies among formerly equal judges. As our experience with district judges sitting by designation on the courts of appeals has demonstrated, giving coequal judges authority to overrule one another's decisions can strain the best of relationships. In the courts of appeals, where cohesive decision-making is essential, relationships among colleagues will be disrupted and decision-making will be influenced, consciously or subconsciously, by the group's knowledge that some of their colleagues may have an opportunity to reconsider or reverse their decisions. Even if recusal is required as set out in section 61(c), a persuasive body of social science research suggests that the loss of equality and collegiality that would attend the adoption of the intercircuit panel proposal could severely undercut the quality of decisions rendered by the courts of appeals.[8] In a paraphrase of an old adage: all court of appeals judges are created equal but some would be more equal than others.

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[8] See Haft, Business Decisions by the New Board: Behavioral Science and Corporate Law, 80 MICH. L. REV. 1, 8-14, 19-23 (1981) (summarizing extensive body of social science research to the effect that (1) cohesive, coequal, and collegial peer groups make better decisions than do individuals and other groups, (2) "[m]embers of the peer groups that the behavioral sciences rank best for decision-making must maintain their equality inter se," and (3) proposals that undermine a group's cohesiveness--its friendship and morale--will reduce the quality of its decisions); Hoffman, Applying Experimental Research on Group Problem Solving to Organizations, 15 J. APPLIED BEHAVIORAL SCI. 375, 380 (1979) ("People with higher organizational ranks tend to participate more actively and to exercise undue influence in the group.").

IV.

S. 704 may also have a pernicious effect on intercircuit collegiality. Section 61(a)(1) provides that the intercircuit panel "shall be composed of nine judges and four alternate judges designated by the Supreme Court of the United States." There is no requirement of proportional representation among the circuits. A failure to distribute these judgeships equally among the circuits would give rise to a perception that the precedent of some circuits is weightier than that of others. The creation of a hierarchy in the federal courts of appeals very likely will weaken the authority of some, elevate the precedent of others, and encourage forum shopping and the continued challenge of decisions from an "inferior" circuit. The avoidance of these results is greatly to be desired.

V.

Finally, and probably most significantly, I would underscore my profound concerns about the designation of judges for the intercircuit panel by the Supreme Court. By statute,[9] the President appoints all circuit judges "by and with the advice and consent of the Senate." Thus, pursuant to an unbroken tradition in this country, the executive and legislative branches always have determined the composition of the federal courts of appeals, pursuant to a process mirroring that prescribed by the Constitution for the selection of Supreme Court justices. This tradition is hardly surprising when we recognize that the caseload of the courts of appeals is nearly coterminous with that of the Supreme Court, and that most decisions of the appellate courts will never be subject to further review. In short, we always have required a "majoritarian check" on the selection of court of appeals judges because we have recognized that this "makes it possible for a democratic society to accept the exercise of vast lawmaking powers by judges who, once appointed, are not responsive to the political process."[10]

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[9] 28 U.S.C. § 44.

[10] Hellman, note 3 supra, at 37.

S. 704 inexplicably abandons our traditional appointment process and cedes to the justices of the Supreme Court the responsibility of selecting members of the proposed new intercircuit court. There is no apparent wisdom supporting this proposed process of "judges selecting judges," especially when it is considered that the jurisdiction of the new intercircuit court would be exactly coterminous with that of the Supreme Court, and that the decisions of the panel would be the law of the land except as overruled by the Supreme Court. It is hard to imagine a court with such awesome power and responsibility being created other than pursuant to presidential appointment by and with the advice and consent of the Senate. S. 704 will produce a situation that is an anathema to the historical role of the appellate judiciary and to the delicate system of checks and balances whose general outline lies in the Constitution and whose statutory manifestation appears in 28 U.S.C. § 44.

This critique is not vitiated by reference to the procedures Congress enacted for the appointment of judges to the Temporary Emergency Court of Appeals (TECA).[11] Even assuming the legitimacy of appointment by the Supreme Court in that situation, there are profound differences between TECA and the proposed new intercircuit panel. TECA was created to consider matters arising from a narrowly defined statutory context. When born, TECA possessed a predetermined and brief life expectancy.[12] The intercircuit panel, in marked contrast, would become a permanent judicial layer if successful in its experimental period. Its docket will include a wide range of recurring issues and its authority will be pre-eminent among the circuits. It is, I submit, a glaring error in S. 704 that it mandates the judicial designation of a panel of judges more powerful than any circuit properly appointed by the President and confirmed by the Senate.[13]

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[11] 12 U.S.C. § 1904 (notes following, section 211(b)(1)).

[12] Id. at § 218.

[13] As Professor Hellman has persuasively argued:

> Recent events have reminded us of the inherent tension between majoritarian power and an independent judiciary. To allow judges--any judges--to select the members of an important court would upset the delicate balance that has been worked out over the years. By eliminating the role of the Senate and the President at the appointment stage, such an arrangement would severely weaken the majoritarian check that makes it possible for a democratic society to accept the exercise of vast lawmaking powers by judges who, once appointed, are not responsive to the political process.

Hellman, note 3 supra, at 37.

VI.

In summary, in my view, S. 704 will increase the workload and disrupt the collegiality of the circuit courts, and insert a powerful new element into the appellate process, an element whose composition is subject to none of our traditional political constraints on judicial selection. The potential and possibly illusory rewards cannot justify the gamble embodied in this deeply flawed bill.

Senator EAST. Thank you, Judge Edwards. Judge Ginsburg?

STATEMENT OF RUTH BADER GINSBURG

Judge GINSBURG. Thank you, Mr. Chairman. Senator Heflin.

S. 704 calls attention to mushrooming caseloads in the Federal courts; by implication it says the answer is not to throw more judges at the problem. Both are worthy observations.

Our Federal courts do need relief from litigation overloads, and the character and quality of the Federal judiciary will become tarnished if we continue to create new judgeships as the simple solution to crowded court dockets. But I do not find load lightening, efficiency-serving promise in the intercircuit panel bill, for the reasons so well stated by my colleagues.

There is, of course, an ideal intercircuit conflict resolver. Judge Winter identified it a few moments ago, and I have the honor now of addressing two of its members. The ideal dissolver of conflicts among courts on the meaning of Federal legislation is Congress itself. On the correct interpretation of Federal statutes no assemblage is better equipped to say which circuit got it right.

The reauthorization of the Equal Access to Justice Act, just this August, is an example in point. Congress said crisply where we should look in determining whether the position of the United States was "substantially justified," and it specifically stated that the act applies to Social Security cases. Circuit splits on those issues once existed but are now over. Courts will be uniform on them in the future.

Congress does give the courts an overdose of legislation with large ambiguities, sometimes calculated, sometimes not. I am fond of Justice Rehnquist's remark on an enigmatic Clean Air Act provision. He said: "The effort to determine congressional intent here might better be entrusted to a detective than to a judge." Rarely a sitting goes by in my court when I am not reminded of that comment by a hazy legislative text.

My first vote for an intercircuit uniformity promoter, then, would go to an active congressional organ, a law revision commission, that reads our opinions and prompts legislative solutions. When the ninth circuit goes one way and the second circuit another, such a congressional overseer could propel technical amendments to statutes to dissolve the conflict and set the courts straight for the future.

But I realize that Congress, too, carries an overload, and that my ideal, first branch, conflict resolver, Congress itself, may not find the task manageable or congenial. (Senator Heflin observed earlier this morning that Congress cannot even manage such uncontroversial docket cutting reform as relieving the Supreme Court of its mandatory jurisdiction.)

Turning to the third branch, I am not sanguine about any add-a-court solution, save one. A brief word about that one. There is a consensus, not about the proposed intercircuit panel, but there is broad agreement among courts of appeals judges, generally—even Supreme Court Justices, I think—that we do not merit the highest marks for our performance in the resolution of Federal tax controversies. A strong case has been made for centralizing Federal tax appeals in a special tribunal. Judge Winter mentioned that prospect earlier. Dean Erwin Griswold made the suggestion in the 1940's; Judge Henry Friendly carried the torch a generation later. And I commend to you a concise article on the subject in the March 1984 ABA Journal (Martin D. Ginsburg, "Making Tax Law Through the Judicial Process," 70 American Bar Association Journal 74 (1984)); the article recapitulates why a single court of tax appeals, inevitably, would promote uniformity and coherence, and would largely spare the Supreme Court from toiling in that vineyard.

But beyond Federal tax law, I doubt that "add-a-court" is the way to rationalize the system. Ninth circuit Judge Joseph Sneed, who currently chairs the ABA Appellate Judges Conference, has explained why the conference opposes the intercircuit panel bill. The conference objects because it sees such a panel as tending significantly to increase, not to decrease, cost and delay in the system. Seventh Circuit Judge Richard Posner, in his admirable book, "The Federal Courts: Crisis and Reform" (1985), sums up his critique without softeners. He wrote:

> It would cut off some conflicts prematurely, resolve others incorrectly, increase the workload of circuit judges (by reducing the numbers actually sitting in the courts of appeals), and delay Federal litigation.

Here is a principal rub, as I see it. Federal court of appeals judges think long and hard before putting their own circuit's decision in conflict with the decision of another circuit. Indeed, we greet with positive glee the opportunity to align ourselves with a sister court's sensible interpretation of, for example, a dense provision of a deregulatory measure, a measure such as the Staggers Act, or the Motor Carriers Act of 1980. When we do split, it is likely that the question is hard, often politically sensitive, and has no clearly right or certainly wrong answer.

What can one expect when such a question is referred to an intercircuit panel? In most cases, another division, perhaps 5 to 4, or 6 to 3. True, the split decision would bind the courts, except the Supreme Court, but the very possibility that the Supreme Court itself might one day speak differently—as Judge Sneed has said—would give the intercircuit panel's opinion an aura of illegitimacy, a second-class finality. Litigants, especially when confronted with large stakes, would search for a way to gain audience with the Higher Authority. One way would be to show that the panel's opinion, or portions of it, clash with Supreme Court earlier or later statements of the law. I can see in my mind's eye the expectable lawyer's performance. "Ah, that's what the intercircuit panel said, but contrast what the real High Court said in point, in 600 U.S. 660, at footnote 63." And there we are, after one more costly stopover, conflict has not ended, we looked ultimately to the only court equipped to speak the last word. (The Supreme Court, as a sage Justice once said, is not final because it is infallible, but is infallible only because it is final.)

I hope, in closing that Congress will maintain its interest in the health and welfare of the Federal courts, by (among other sensible excisions) removing from the pipeline cases best heard elsewhere—diversity cases where plaintiff is a resident of the forum State, for one clear example, Jones Act, and FELA cases, in my judgment, for another—and by supporting increased use of out-of-court, or adjunct-to-court measures of dispute resolution. S. 704 will be most detrimental in my view, if it deflects attention from trimming and support measures, both immediate and long term, capable of providing to the Federal courts genuine relief. Thank you.

[Prepared statement follows:]

PREPARED STATEMENT OF RUTH BADER GINSBURG

S. 704 calls attention to mushrooming caseloads in the federal courts; by implication it says the answer is not to create more judgeships. Those are key considerations. Our federal courts do need relief from litigation overloads; and throwing more judges at the problem threatens the character and quality of the federal judiciary. But I do not find load-lightening, efficiency-serving promise in the intercircuit panel bill, for the reasons well-stated by my colleagues.

There is, of course, an ideal intercircuit conflict resolver. Judge Winter identified it in his statement. I have the honor of addressing some of its members. Congress itself. On the correct interpretation of federal statutes, no assemblage is better equipped to say which circuit got it right. The reauthorization of the Equal Access to Justice Act this August is an example in point. Congress said crisply where we should look in determining whether the position of the U.S. was "substantially justified," and it specifically stated that the Act applies to Social Security cases. Circuit splits on those issues are over. Courts will be uniform on them in the future.

Congress does give courts an overdose of legislation with large ambiguities, some times calculated, sometimes not. Justice Rehnquist said of an enigmatic Clean Air Act provision: "The effort to determine congressional intent here might better be entrusted to a detective than to a judge." Rarely a sitting goes by when I am not reminded of that comment by a hazy legislative text.

My first vote for an intercircuit uniformity promoter, in short, would go to an active congressional organ—a law revision commission—that reads our opinions and prompts legislative solutions. When the Ninth Circuit goes one way, and the Second another, such a congressional overseer could propel technical amendments to dissolve the conflict and set the courts straight for the future.

But I realize that Congress too carries an overload and that my ideal, first branch, conflict resolver may not find the task manageable or, indeed, hospitable.

Turning to the third branch, I am not sanguine about any add-a-court solution, save one. A word about that one. There is a consensus that court of appeals judges, even Supreme Court Justices, merit no high marks for their resolution of federal tax controversies. A strong case has been made for centralizing federal tax appeals in a special tribunal. Judge Winter so noted in his remarks. Dean Erwin Griswold made that suggestion in the 1940's; Judge Henry Friendly carried the torch a generation later. I commend to you a concise article on the subject in the March 1984 American Bar Association Journal (Martin D. Ginsburg, "Making Tax Law Through the Judicial Process," 70 A.B.A.J. 74 (1984)); the article recapitulates why a single court of tax appeals inevitably would promote uniformity and coherence, and would largely spare the Supreme Court from toiling in that vineyard.

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Richard A. Posner, in an admirable book published this year, "Federal Courts: Crisis and Reform," sums up his critique without softeners. He wrote: "It would cut off some conflicts prematurely, resolve others incorrectly, deflect attention from the real causes of Supreme Court problems, increase the workload of circuit judges (by reducing the numbers actually sitting in the courts of appeals), and delay federal litigation."

Here's a principal rub as I see it. We think long and hard before putting ourselves into conflict with another circuit. Indeed, we greet with positive glee the opportunity to align ourselves with a sister court's sensible interpretation of, for example, a dense provision of deregulatory legislation—measures such as the Staggers Act, or the Motor Carriers Act of 1980. When we do split, it is likely that the question is hard, often politically sensitive, and has no clearly right or certainly wrong answer.

What can one expect when such a question is referred to an intercircuit panel? In most cases, another division, perhaps 5 to 4, or 6 to 3. True, the split decision would bind all courts except the Supreme Court. But the very possibility that the Supreme Court itself might one day speak differently, as Judge Sneed has said, would give the intercircuit panel's opinion an aura of illegitimacy, a second-class finality. Litigants, especially when confronted with large stakes, would search for ways to gain audience with the Higher Authority. One way would be to show that the panel's opinion, or portions of it, clash with Supreme Court earlier or later statements of the law. (I see in my mind's eye the expectable lawyer's performance: "That's what the ICP said, but contrast what the real High Court said on point in 600 U.S. 6, at footnote 43.") And there we are, after one more costly stopover, conflict has not ended, we look ultimately to the only court equipped to speak the last word.

I hope, in closing, that the Congress will maintain its interest in the health and welfare of the federal courts by removing from the pipeline cases best heard elsewhere—diversity cases where plaintiff is a resident of the forum state, for one example, Jones Act and F.E.L.A. cases for another—and by supporting increased use of other or adjunct methods of dispute resolution. S. 704 will be most detrimental if it deflects attention from trimming and support measures—both immediate and long-term—capable of providing genuine relief.

Senator EAST. I thank all three of you for your contributions here this morning. I would like to ask one question which I think comes out of the testimony of all three of you.

I am raising, I guess, somewhat of a constitutional question regarding the power of the Congress. It occurs to me—and I am sure there are, of course, arguments contrary to this—that the Congress, by statute, is delegating part of the constitutional power of the Supreme Court.

That is, under article III, section 1, we can have one Supreme Court. We cannot have two. We cannot have a junior Supreme Court. We can have one.

And I would be interested in hearing from you—any one of you can respond—on that constitutional question.

Even demurring for purposes of debate, that it would be a good practical idea, an excellent idea to create the intercircuit panel. I wonder, though, in terms of the remedy, whether we might not need, then, a constitutional amendment as opposed to a simple act of Congress, because again, I say, it occurs to me, you cannot escape easily at least the concern, that you are, by statute, delegating constitutional power of the Court. Do you think that is, or is not a valid point?

Judge WALD. Let me lead off. As an article III judge, I am very reluctant to give advisory opinions, Senator.

Senator EAST. All right. You are not supposed to do that, I know.

Judge WALD. I will leave it that I think the bill, in its present form, certainly raises questions especially because of the nature of the selection of the judges.

However, we have had prior proposals to create a "National Court of Appeals." The old National Court of Appeals mode would not have given me any constitutional problems at all. I think Congress does have the right to create a tier in between the circuit courts and the Supreme Court.

The particular mechanism used here, however, whereby a call goes up to the Supreme Court and then the Court lops it back down to another court, clouds the issue more, and while I certainly would not hazard a constitutional opinion yes or no, I think there are some serious questions that would have to be looked at.

Judge **Edwards**. I will not either render a decision on the question. I would answer you, Mr. Chairman, by saying, as I say in my written statement, I think there are powerful separation of powers problems with the bill. My principal concern is the selection of judges by judges. That is an unseemly process in this bill, and I think one that a great many of my colleagues throughout the country will find terribly objectionable. I cannot speak for other judges but I can certainly guess that most judges will find it offensive to have judges selecting judges to so powerful a court.

That is so antithetical to our tradition, that it is astonishing that it is being proposed as it is, especially when it is coupled with a proposal that this intermediate court will have unlimited and coterminous jurisdiction with the Supreme Court, as defined by the Supreme Court. I think that is the concern you are raising. It is a concern.

I would say nothing more than we have a tradition that is so inconsistent with this approach, that it is certainly worrisome, and it is most worrisome because this bill is founded on a notion of judges selecting judges to determine cases that only the Supreme Court would otherwise determine.

That is an astonishing notion, given our tradition in this country.

Senator **East**. If I might digress for a moment on the point you are raising there. I wonder, too, if that is not a constitutional problem of sorts.

That is, as we know under the Constitution, Federal judges and Justices of the Supreme Court are nominated by the President and approved by the Senate. Now we have judges being appointed by other judges to serve in roles other than that for which they were nominated by the President and confirmed by the Senate.

Now, as I say, proponents of S. 704 might contend, "Yes, but at one point they were approved." Yes, but they were approved for a different kind of function than we are now giving them and this new function is solely one where judges designate judges.

Again, I know all of you do not wish to cast forth on the waters your constitutional opinions here this morning in such abbreviated form, and I will not ask you to respond to that, but it does occur to me that there might be a question on this point if the intercircuit panel is created. How the Supreme Court might deal with it, I do not know.

Judge **Ginsburg**. If I may, Judge Sneed coined an expression in relation to the appointment authority for this proposed panel. He asked: Is this to be a "clone court'? Is the judge selected to try to mirror the Justice who made the appointment? If that is the case, he said, there is a grave concern about judicial independence.

Judge Sneed conceived of an appointee to this panel as more independent than a law clerk, but less independent than a judge appointed to his or her post through the constitutional process.

Senator EAST. Thank you. I have no additional questions. Senator Heflin?

Senator HEFLIN. Some of the questions you raise are quite interesting. Today, we have intracircuit conflicts developing, and some of the circuits have resolved these conflicts by having a panel of circuit judges sitting en banc.

Today you have judges appointing judges: the bankruptcy judges, the magistrates, and others that are appointed, just as a passing remark.

Judge Edwards, I was interested in your collegiality argument. Do you think that the designation of a member of your circuit as chief judge harms the collegiality of your court?

Judge EDWARDS. No. It is pursuant to a system within the ranks, a seniority system, an accepted, well-understood seniority system, and it involves someone within the ranks and who is serving as a part of our group, not going elsewhere. The collegiality problem that I am talking about would occur because someone within the ranks would serve elsewhere, and have a different power function as a virtue of that. Our chief judge has no greater vote, by virtue of being chief judge, than do I, and is a part of the same collegial body, and no collegial body is seriously disturbed by the fact that one person is the designated leader of that collegial body.

Judge WALD. If I might add a word to Judge Edwards, I, too, think that the fact that the selection process is clearly laid out in the statute and is an objective one makes a difference. In other words, it is seniority by date of appointment, and so reflects no selection on the basis of merit.

I think your question would certainly be even more relevant if we had a situation in our circuits whereby we got together, as some State courts do, and elected our favorite person to be chief judge, but we have nothing like that going on, by statute, in the circuit.

In fact Congress, in the 1982 Court Improvements Act, did us several favors, in straightening out different practices among the different circuits, and laying down fairly clear guidelines for succession, for how long a person is chief judge, for who is eligible, et cetera.

Senator HEFLIN. Do you think that sarcastic opinions affect the collegiality of the Court?

Judge WALD. Surely.

Judge EDWARDS. But I think the difference, Senator Heflin, is, again, it is within the group, and we can manage because we are coequals, and we work, and I think our own circuit is a good example of that. We have differences but we have also learned how to work within the group, as coequals, to try and work them out.

It is a very different process, when you designate one, or two, or several of those people, to serve a very different "super" function, as members of a court comparable to that of the Supreme Court.

Judge GINSBURG. I think, too, that the sarcasm, as you put it, sometimes may be a way to grab the audience, to stimulate the readers.

My colleagues here occasionally have written responses one might call "sarcastic" to opinions, that I have written. But I read such "red flag" opinions more often than not, with amusement rather than anger or irritation. I know that we have great respect for each other as individuals; and I appreciate that if a judge is dissenting in a rather difficult, technically complicated Federal Energy Regulatory Commission case, for example; sharp remarks indicate a technique designed to grasp and hold the reader's attention. So I do not take the sharp remarks in any way as a personal affront.

Senator HEFLIN. If collegiality is an attribute, and, if it is something to be desired, then any sarcastic opinion tends to erode it, does it not? I really think that the collegiality concept that I hear being expounded is overdone. I think that you inherently, if you get on one side or the other, you are in effect a competitor.

You can be competitors and still have a collegiality that exists with you, but the inherent nature of opinion writing, decisions, where they are disputed, tends to erode collegiality.

Judge WALD. At one level you are absolutely correct, that there is no question there are tense moments when people are putting forth very strongly held opinions, but I think the kind of collegiality that Judge Edwards is talking about is a little bit different.

We are still, at the end of the day, no matter how much we disagree, we are all peers. He who fights and runs away lives to fight another day. We come back as equals.

The relationship would be inherently different if one of those people that you were disputing with, you knew had a second shot from up above. It is just a different ballgame.

Judge GINSBURG. And the relationships, the groupings shift. The press, perhaps Congress too, has a tendency to type us, and say, oh, that is one camp—the "liberals"—and that is the other—the "conservatives." If you look at our actual performance, and see how we line up in cases over the course of a year or two, we cannot be pegged so easily. One may appear biting or bitter to a colleague one day and the best of friends, together, the next day, when another judge is dissenting. On the court, we are not aligned as political parties and we genuinely respect each other. I can say that, with no doubt at all, after over 5 years on the job.

Senator HEFLIN. There are some court systems that have used horizontal and vertical mobility. There are court systems that authorize the use of trial judges at the appellate level to write opinions. They return to the trial level.

There are judges that are in intermediate appellate courts, that have the vertical mobility of becoming members of the highest court in a State.

From my observation, I do not think that you have much of an argument. I do not give much credit to that argument because I have seen it working.

Judge EDWARDS. Senator Heflin, if you indulge me, I can give a good example to support our point on the trial judges. One of the most difficult problems we have to deal with is trial judges sitting by designation on the court of appeals. Over and over again, trial judges openly say it is a most uncomfortable circumstance for them, and they almost always refuse to write the opinion if it involves the reversal, or the alteration of the work of a fellow lower court judge. The thing that they are prepared to do for us, for the most part, is to sit because we are short on manpower; this is a very important but limited contribution that they make.

The example on trial judges that you give is precisely the one that we would give to you to say it proves the point on collegiality. They do not like to sit at the appellate court.

Senator **HEFLIN**. Well, at the State level—I do not know about the Federal level—I think the opposite has been my observation in regards to that.

Now you talk about the workload of the circuits. This bill does provide for senior judges. I do not know how many, whether it would be designation, and whether or not the use of senior judges, as opposed to an odd mixture, might eliminate some of the concerns.

Judge **WALD**. If I might just comment on that, briefly. I notice that S. 704 not only permits senior judges to serve on the new court but sets no limit on how many. If it does go forward, I would at least suggest attention to putting some limits on senior judge membership. Our senior judges are an excellent resource to many of us on the circuit. On the other hand, they are senior for generally good reasons. They have recognized that they have limits now in their capacity both for work and for overwork.

Congress, a few years ago, when you were laying down rules for us, for the most part, very acceptable rules, would not let a senior judge sit on an en banc to make his circuit's own law unless he had sat on the panel.

You also set a limit on the number of senior judges who could sit on any one panel. That suggested to me, that you felt that the law in the circuit should be made, for the most part, by the active judges.

Now, I suggest there is a bit of an inconsistency if our active judges make our en banc law in the circuit, and then senior judges, who are not allowed to participate in that process are allowed to overrule it on the intercircuit tribunal.

These things are not "black and white," Senator, but it is untidy. There is just something that makes some of us feel a little uncomfortable about it.

Senator **HEFLIN**. Well, I think the consistency argument about Congress is a legitimate argument, but I would not think that Congress remembers whether it was or was not consistent. I have not observed the consistency as being a criteria as to any future decisions that have been made by Congress. So I think you have a legitimate argument as to—you say inconsistency, but there has been a lot of inconsistency. And there are a lot of times, when judges assume senior status when they become eligible, to help their court have another judge for manpower purposes, or for the purpose of trying to help the workload of that particular court, and many of them continue in this status not because they——

Judge **WALD**. I understand that.

Senator **HEFLIN** [continuing]. They are physically or mentally incapacitated, or anything like that.

Judge **WALD**. My point is a slightly different one. Congress, in establishing the lawmaking process in the circuit, said it belonged in the main to the active circuit judges. So I find some problem when the circuit, getting all its judge power together and deciding this is the way we want to come out on this issue, even though we are in conflict with "X" circuit over here, that through the same process came out there, being overruled by judges who, at least now under statute, are ineligible to participate in the actual law making of the circuit. It does seem to me that there is some inconsistency there.

Senator EAST. If you will excuse us, please, we have a vote on. I am sorry about that. We will be back as soon as we can. I had no additional questions for the panel. Did you, Senator Heflin?

Senator HEFLIN. No, I do not.

Senator EAST. Thank you very much, and again, our apologies to the others, for holding you up.

[A vote recess was taken.]

Senator HEFLIN [presiding]. The subcommittee will come to order.

Our next witness is Judge Pierce Lively, chief judge of the U.S. Court of Appeals for the Sixth Circuit. Senator East has asked me to preside until he returns. We have the prospect of another vote occurring fairly soon, so we want to go ahead and let every witness testify if possible. Judge Lively, if you will, please go ahead. We are delighted to welcome you to the subcommittee.

STATEMENT OF HON. PIERCE LIVELY, CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

Judge LIVELY. Thank you, Senator Heflin. It is a privilege to appear and testify before this body and I do appreciate the invitation.

I also appreciate your waiving the usual requirement of advance text since I was holding court in Cincinnati all last week and had short notice; however, I have now prepared a statement which I have filed with the clerk.

Mr. Chairman, I appear today in support of S. 704, a bill to establish an intercircuit panel. By way of background, my experience in the Federal court system includes 13 years as an active judge on the Sixth Circuit Court of Appeals, and since October 1, 1983, I have been chief circuit judge of the sixth circuit, and by virtue of that position a member of the Judicial Conference of the United States.

In addition, I have been a member of the Judicial Conference Advisory Committee on Federal Appellate Rules since 1977 and chairman of that committee for the past 3 years, or so.

In testifying, of course, I speak only for myself, and not for my colleagues on the court or that committee.

In my opinion, S. 704 represents a reasonable approach to the increasingly serious problem of the Supreme Court's workload. As you pointed out, Senator Heflin, this proposal may not contain the only possible approach to the problem, and it certainly does not provide a complete cure. However, it does represent a first step, at least, in providing some relief.

I would like to emphasize three conclusions which I have reached concerning S. 704. The first is that the Supreme Court is overburdened.

Some critics of this and earlier bills addressing the problem have questioned whether the Supreme Court is actually overworked. I recognize that all the Justices do not agree on the approach of S. 704. Nevertheless, virtually every one of them has stated in recent years that the demands have become too great, and I think it is somewhat presumptuous for anyone who has not experienced those demands to assert that the Court needs no help.

Little can be done to reduce the 5,000 or so petitions for certiorari which the Court receives each year, and indeed, I would not favor any proposal which took from the Supreme Court the task of deciding what cases warrant review. This may be the most important work of the Court. However, some way must be found to permit the Court to limit plenary review to those cases involving constitutional questions and other fundamental issues of national scope and importance. Our Supreme Court is a unique institution. It is not a court for the correction of error, as most high courts are. It is a court which does have a larger role and its energies are most effectively expended in that larger role. Yet the necessity to settle intercircuit conflicts requires the Justices to spend time on issues which often could be settled satisfactorily by a tribunal concerned with the more familiar appellate task of deciding cases between litigants.

The proposal for an intercircuit panel would establish such a tribunal and give the Supreme Court additional time to spend on matters of greater importance.

My second point is that intercircuit conflicts are a real problem. The practice of law is no longer the local activity for many lawyers that it was some years ago. The mobility of our population and the expansion, nationwide, of many business organizations, have increased the demand for uniformity in the law. Thus we have the monumental efforts, such as those of the American Law Institute, to frame a restatement of the law, to bring more uniformity to the substantive law of the American jurisdictions.

Theoretically, at least, the problem of nonuniformity should exist only among the 50 States. In fact, however, the regional courts of appeals in the Federal system have tended to develop individual interpretations and holdings referred to as "the law of the circuit."

The growth of the "law of the circuit" is an interesting phenomenon given the fact that except when exercising diversity jurisdiction the courts are all dealing with the same body of Federal law. However, there is a lack of uniformity, and when two or more circuits disagree with respect to some issue of Federal law, the only place now available for settlement of the conflict is the Supreme Court.

In his speech to the 1985 midyear meeting of the American Bar Association in Detroit last February, Chief Justice Burger stated that the Supreme Court had decided an average of 48 intercircuit conflict cases in each of the past three terms, and 55 such cases in the 1983–84 term.

Though some of these cases may involve issues of transcending importance which would lead the Supreme Court to grant review even in the absence of conflict, I believe a good number of them would not rate High Court consideration were it not for the intercircuit conflict.

If the Supreme Court could be relieved of the necessity of deciding, say, two-thirds of the conflict cases which it now takes, it could reduce the number of signed opinions by approximately 20 to 25 percent, and devote the time saved to cases of greater importance to the entire Nation.

I do not believe, however, that the sole benefit of S. 704 would be to relieve the Supreme Court. The Supreme Court does not grant review in all the cases where it is sought on the basis of an intercircuit conflict.

Thus, many of the conflicts remain unresolved. There are litigants who engage in forum shopping on the basis of intercircuit conflicts, perceived, or real. In addition, there are administrative agencies of the executive branch which will follow the ruling of the court of appeals only within that circuit and seek a contrary ruling in other circuits.

These practices increase conflicts and, in my opinion, are undesirable. No one believe there can ever be total uniformity in the interpretation of any body of law. After all, there would be no place for judges and lawyers if that were true.

However, it appears to me that the bar and litigants would benefit from the resolution of those intercircuit conflicts which the workload and legitimate priorities of the Supreme Court now leave unresolved.

Furthermore, the lower Federal courts would benefit. We are constantly being urged to follow the law of another circuit, or to ignore such law and declare the law of our circuit.

If there were a tribunal with authority to resolve these conflicts and thus bring a greater degree of uniformity to the interpretation of laws having national scope and impact, though not of the most fundamental importance, the courts and the public would be well served.

Finally, my third point, Mr. Chairman, Senator Heflin, is that I believe S. 704 is a carefully drafted and well thought-out bill.

It recognizes the fact that the intercircuit panel may not be able to accomplish all that is hoped for and therefore provides a short 5-year life for the panel.

Though a somewhat longer trial might be desirable, this is a reasonable trial period for a new experiment and ensures that if it does not achieve the hoped-for results, the new entity will not be able to perpetuate itself.

Some opponents of the bill complain that it will effect a radical restructuring in the Federal court system. With all due respect to those opponents, including my colleagues who have testified here today, I do not agree.

The bill does not create a new court with new judges and new supporting staff. Rather, it takes a very economical approach by borrowing incumbent judges and assigning them to temporary additional duties. It also requires existing courts to provide necessary facilities and personnel from existing staff.

The idea of assigning additional judicial service to sitting judges is not new. We have intercircuit assignments throughout the courts of appeals. We have district judges assigned by designation.

We also have special assignments of judges who have previously been confirmed to courts completely different from the court to which they were originally appointed.

Therefore, I do not agree with Mr. Spears, and the others, who have said that the appointment should be made by the President and ratified by the Senate.

It is not an appointment; it is a designation. These judges have all been previously appointed, they have come to this room and testified before the Judiciary Committee, they are judges in every respect. As one example of additional assignments, right now we have the Temporary Emergency Court of Appeals [TECA].

The members of TECA are assigned by the Supreme Court, or perhaps by the Chief Justice. This court passes on disputes in the petroleum industry that are binding on all the Federal courts in the country. It has national jurisdiction. And it was appointed merely by orders of the Supreme Court. I do not think there is any problem with designating sitting judges to additional duties. I do not believe it will be disruptive for the courts of appeals to assign one judge from each to an intercircuit panel for limited periods of time.

The intercircuit panel will not be a court of continuous session. It will meet a few times each year to consider matters referred to it by the Supreme Court. And has been noted, the bill provides for both active and senior judges. According to documented history, many people viewed the establishment of the circuit courts of appeals in 1891 with alarm. They felt it was wrong to disturb the structure of the Federal court system, even though it was clear that the Supreme Court's docket was overcrowded.

Contrary to fears expressed at that time, the regional appeals courts have helped rather than hindered the administration of justice in the Federal court system. That was an experiment that succeeded.

It is hard to imagine the system working today without a body of intermediate courts of appeals. The same apprehension was expressed about the 1925 legislation which greatly enlarged the discretion of the Supreme Court in deciding what cases to hear.

The total caseload of the Federal courts has increased dramatically in the last few years, and if some refinement was necessary in 1891 and 1925, I submit that refinement is required again today.

There are cases that are not intrinsically important enough to command the attention of the Supreme Court which are being decided in plenary fashion by the Supreme Court solely on the basis of intercircuit conflict.

There are other proposals now in various stages of consideration by the Congress to address the problem of the workload of the courts of appeals, and it is hoped that some of these will be adopted soon. Mr. Spears pointed out a couple of those such as an article I Social Security Court and limitation on diversity jurisdiction. I testified in support of both of those proposals before this committee, on March 7, 1984.

Mr. Chairman, I have attempted to familiarize myself with the arguments being made in opposition to S. 704, and while these criticisms are honestly made, they appear to be more theoretical than practical. Most appear to be based on assumptions of the critics rather than proven facts, and the best way to test these assumptions, I submit, is by going through the 5-year experimental period and seeing what actually happened.

It seems to me that during tbe experimental period, the Congress should be looking at the proper makeup, if a permanent entity is created on the basis of the results of this 5-year experience. It seems to me that it is worth the effort. It is not a great risk and it is economical. Therefore, I fully support the proposal as contained in S. 704 and would urge its early adoption.

Mr. Chairman, again I thank you for the opportunity to appear here, and of course I will be pleased to answer any questions.

[Prepared statement follows:]

PREPARED STATEMENT OF PIERCE LIVELY

Mr. Chairman and members of the Subcommittee, it is a privilege to appear and testify before this body, and I do appreciate the invitation. I also appreciate your willingness to permit me to appear without filing a written summary of my testimony in advance. As you are aware, Mr. Chairman, the notice was short, and I was engaged in a hearing session of the Court of Appeals in Cincinnati all last week.

Mr. Chairman, I appear today in support of S. 704, a Bill to establish an Intercircuit Panel, which is now before the Subcommittee. By way of background, my experience in the federal court system includes thirteen years as an active circuit judge on the Sixth Circuit Court of Appeals. Since October 1, 1983 I have been chief circuit judge of the Sixth Circuit and, by virtue of that position, a member of the Judicial Conference of the United States. In addition, I have been a member of the Judicial Conference Advisory Committee on Federal Rules of Appellate Procedure since 1977 and chairman of that Committee for the past three years or so. In testifying, I speak only for myself; other judges on my court may disagree with my views.

In my opinion S. 704 represents a reasonable approach to the increasingly serious problem of the Supreme Court's workload. As Senator Heflin has pointed out, this proposal may not contain the only possible approach to the problem, and it certainly will not provide a complete cure. However, it does represent a first step at least in providing some relief. I would like to emphasize three conclusions which I have reached concerning S. 704.

1. The Supreme Court is overburdened. Some critics of this and earlier bills addressing the problem have questioned whether the Supreme Court is actually overworked. Virtually every Justice has stated in recent years that the demands have become too great, and I think it presumptious for anyone who has not experienced these demands to assert that the Court needs no help. Little can be done to reduce the 5,000 or so petitions for certiorari which the Court receives each year; I would not favor any proposal which took from the Supreme Court the task of deciding what cases warrant review. That may be the most important work of the Court. However, some way must be found to permit the Court to limit plenary review to those cases involving constitutional questions and other fundamental issues of national scope and importance. Our Supreme Court is a unique institution. It is not just the court of

last resort for litigants as so many high courts are. It has a much larger role than that of a court for correction of error and its energies are most effectively expended in that larger role. Yet, the necessity to settle intercircuit conflicts requires the Justices to spend time on issues which often could be settled satisfactorily by a tribunal concerned with the more familiar appellate task of deciding cases between litigants. This, after all, is the task of the circuit courts of appeal which function primarily as courts for review of district court proceedings. The proposal for an Intercircuit Panel would establish such a tribunal and give the Supreme Court additional time to spend on matters of greater general importance.

2. Intercircuit conflicts are a real problem. The practice of law is no longer the local activity for many lawyers that it was some years ago. The mobility of our population and the expansion nationwide of many business organizations have increased the demand for uniformity in the law. Thus we have monumental efforts such as the Restatement of the Law by the American Law Institute to bring more uniformity to the substantive law of the various American jurisdictions.

Theoretically, at least, the problem of non-uniformity should exist only among the fifty state jurisdictions. In fact, however, the regional courts of appeals in the federal system have tended to develop individual interpretations and holdings referred to as "the law of the circuit." The growth of "the law of the circuit" is an interesting phenomenon, given the fact that, except when exercising diversity jurisdiction, the courts are all dealing with the same body of federal law. However, there is a lack of uniformity, and when two or more circuits disagree with respect to some issue of federal law, the only place now available for settlement of the conflict is the Supreme Court. In his speech to the 1985 midyear meeting of the American Bar Association in Detroit last February, Chief Justice Burger stated that the Supreme Court had decided an average of 48 intercircuit conflict cases in each of its past three terms, and 55 such cases during the 1983-84 term.

Though some of these cases may involve issues of transcending importance which would lead the Supreme Court to grant review even in the absence of conflict, I believe a good number of them would not rate high court consideration were it not for the conflict. If the Supreme Court could be relieved of the necessity of deciding two-thirds of the conflict cases which it now takes, it could then reduce the number of signed opinions by approximately 25% and devote the time saved to cases of greater importance to the entire nation.

I do not believe, however, that the sole benefit of S. 704 would be to relieve the Supreme Court of some work which could be performed satisfactorily by a different tribunal. The Supreme Court does not grant review in all the cases where it is sought on the basis of intercircuit conflict. Thus, many of the conflicts remain unresolved. There are litigants who engage in forum shopping on the basis of intercircuit conflicts, perceived or real. In addition there are administrative agencies of the Executive Branch which will follow the ruling of a court of appeals only within that circuit and seek a contrary ruling in other circuits. These practices increase conflicts and are undesirable.

No one believes there can ever be total uniformity in the interpretation of any body of law. After all, there would be no place in this world for lawyers or judges if that were possible. Nevertheless, it appears to me that the bar and litigants would benefit from the resolution of the intercircuit conflicts which the workload and legitimate priorities of the Supreme Court now leave unresolved. Furthermore, the lower federal courts would benefit. We are constantly being urged to follow the law of another circuit or to ignore such law and declare the law of our circuit. If there were a tribunal with authority to resolve these conflicts and thus bring a greater degree of uniformity to the interpretation of laws having national scope and impact though not of the most fundamental importance, the courts and the public would be better off.

3. Finally, Mr. Chairman, I believe S. 704 is a carefully drafted and well thought out bill. It recognizes the fact that the Intercircuit Panel may not be able to accomplish all that is hoped for and provides a five year life for the Panel. Though a somewhat longer trial might be desirable, this is a reasonable trial period for a new experiment, and ensures that if it does not achieve the hoped-for results, the new entity will not be able to perpetuate itself.

Some opponents of the bill complain that it will effect a radical restructuring of the federal court system. I do not agree. The bill does not create a new court with new judges and new supporting staffs. Rather, it takes a very economical approach by "borrowing" incumbent judges and assigning them to temporary additional duties. It also requires existing courts to provide necessary facilities and personnel from existing staffs. The idea of assigning additional judicial service to sitting judges is not new. As Chief Justice Burger has pointed out, this has been done on a number of occasions. Currently the Temporary Emergency Court of Appeals consists entirely of judges with other primary responsibilities. I do not believe it will be disruptive for the courts of appeals to assign one judge each to the Intercircuit Panel for limited periods of time.

The Panel will not be a court in continuous session, but will meet a few times each year to consider matters referred to it by the Supreme Court. The Bill provides for either active or senior judges to be assigned to the Panel. This gives flexibility to the appointing authority to avoid disrupting the work of a circuit court of appeals with vacancies in its authorized complement of active judges.

According to documented history, many people viewed the establishment of the circuit courts of appeals in 1891 with alarm. They felt it was wrong to disturb the structure of the federal court system, even though it was clear that the Supreme Court's docket was overcrowded. Contrary to fears expressed at the time, the regional appeals courts have helped rather than hindered the administration of justice in the federal court system. That was an experiment that succeeded. It is hard to imagine the system working today without a body of intermediate courts of appeals. The same apprehension was expressed about the 1925 legislation which greatly enlarged the discretion of the Supreme Court in deciding what cases to hear.

The total case load of the federal courts has increased dramatically in recent years. If some refinement of the structure was necessary in 1891 and 1925, it is obvious that further refinement is required today. There can be only one Supreme Court and its role in our political structure is too important to be hampered by the requirement of deciding cases not intrinsically important enough to command its attention. The proposal embodied in the Bill now being considered has the promise of offering substantial relief to the Supreme Court. In my opinion this is an important first step. Other proposals now in various stages of consideration by the Congress address the problem of the workload of the courts of appeals, and it is to be hoped that some of those proposals will be adopted soon.

Mr. Chairman, I have attempted to familiarize myself with the arguments being made in opposition to S. 704. While all of these criticisms are honestly made, some of them appear purely theoretical rather than practical. Once it is accepted that there is a serious problem affecting one of our most vital governmental institutions, there should be little energy expended on purely academic arguments. Rather, efforts should be directed toward finding workable solutions. In my opinion, S. 704 offers an opportunity to test a method for dealing with a portion of the problem at a minimum risk of disturbing existing procedures and at a minimum cost. If the experiment proves successful, that will be the time to consider carefully how best to implement this solution on a permanent basis. I trust that studies will be carried on during the experimental period so there will be well considered proposals for a permanent structure if the results with the Intercircuit Panel are sufficiently significant.

One thing further should be said. I have limited my remarks to the proposal for reference by the Supreme Court of cases involving intercircuit conflicts. I realize that S. 704 provides that the Supreme Court may refer any case to the Panel. While experience may disclose other types of cases where referral would be appropriate, I assume that the majority of referrals, at least during the first few years, would involve intercircuit conflicts. This class of cases was referred to specifically by Chief Justice Burger in proposing an Intercircuit Panel, and most discussion of the proposal has assumed the referred cases would involve intercircuit conflicts.

Again, Mr. Chairman, thank you for the opportunity to appear and testify. I now have a brief prepared statement which I would like to file, and of course, will be happy to answer any questions.

Senator EAST. Judge Lively, we certainly appreciate your coming, and your contribution.

I would like, if I could, please, just to ask your reflections on the point that Justice John Paul Stevens raises, that as he sees it, as an Associate Justice of the Supreme Court, that the intercircuit panel would simply double the capacity of the Court to handle cases.

I am not saying there are not contrary points of view. Do not misunderstand me. I realize there are. But as a member of that body, and seeing its inner workings and operations, he is of the opinion that the Court's appetite to take on additional cases—assuming it assigned all conflict cases to the intercircuit panel—is of such a nature that it is unlikely that it would exercise restraint in this regard.

This leads me to the Sexton-Estreicher comment, which maybe gets us into more of a philosophical or theoretical point about whether the Court's problem is not seen in this tendency to look upon it as the court, always, of "last resort." In fact, it cannot really be the court of last resort, in each and every case in this country.

Sexton and Estreicher are contending, it seems to me, that as long as the Court envisions its role as the court of last resort, and you create this new intercircuit panel, you will simply double the capacity of, if you will, their appetite for judicial activism. I would just be interested in your comments on that.

Judge LIVELY. Well, of course you start off by quoting an Associate Justice of the Supreme Court and he knows more about the inner workings of the Supreme Court, obviously, than I do.

Again, I am inclined to believe that is an assumption that could be tested within the 5-year period. The Supreme Court of course is just a most unusual body. It was nine in 1789 and it is nine in 1985.

They have to govern themselves and this talk—this strays a bit but it is on the subject to their "wounds being self-inflicted," which it seems to me is kind of beside the point. They are who they are and they are what they are, and they have to manage their own business, and there are ebbs and flows in the life of the Supreme Court, and in the way they manage that business.

I think the fact that the Supreme Court has never, even in its most active day, taken in more than, I think, 209 cases out of some 5,000 petitions for certiorari, shows that they do not really consider themselves a "court of last resort" for all of the litigation in the Federal court system. Obviously they are not. As to whether they are too activist, and therefore would use this as an opportunity to reach for more cases, I do not know. It seems to me that since at least eight of them have said, on many occasions, publicly, that they are overburdened, and they have more or less appealed to the Congress to do something about it, if the Congress came forward with something concrete, such as I think S. 704 is, my belief is that they would try to exercise some additional restraint to prove that, given an opportunity they really could help themselves.

That is just an opinion, but it may not be worth anything.

Senator **East**. Thank you. Senator Heflin.

Senator **Heflin**. Judge Lively, with your experience on judges concerning activism, would you say that that is a philosophical bent as opposed to an absence of a workload?

Judge **Lively**. I have never been sold on the definition of "judicial activism." Judges, as you know so well, Senator Heflin, having served for many years with distinction on a high court, judges are just people and some cases interest them more than others.

And they might tend to come out a little stronger in some—an individual judge comes out a little stronger in one area of the law than he does in the other.

But most judges that I know—and I know a lot of them now because I am going to be one of the more senior members of the Federal judiciary—most judges do not like to reach out for things that are not presented to them. Lawyers have enough ingenuity to present all kinds of cases to judges, and judges do not have to reach out, and most judges I know do not reach out.

And therefore, it seems to me that what is perceived as judicial activism may just be a "sign of the times." We have a different approach by lawyers than we had when I was practicing and when I went to law school, and they promote activism and then go to the bar meetings and yell about it.

But my point is that most of the activism does not originate in the mind of a judge; it is a suggestion that is planted there by a lawyer, usually.

Senator **Heflin**. Well, I believe, from my observation of judges, it is an individual matter whether or not he exercises restraint, or whether or not he wants to be a philosopher king, and the workload does not have a thing in the world to do with it. I believe Justice Stevens, as he——

Judge **Lively**. You would not stop the philosopher if he had a thousand cases on his desk. If he finds the case that——

Senator **Heflin**. If he found one he could reach out there and grab, it would not make any difference.

Judge LIVELY. The one that interest him the most; that is my point. We all have certain interests, and you will tend to write more, and to be more philosophical in an area that you have an interest in than if it is an area of very routine law.

Senator HEFLIN. The way you cure that is appointment.

Judge LIVELY. Well, that is right, and this committee gets the first shot at that, too.

Senator HEFLIN. Well, no, we do not do it; it is the President who does that.

Judge LIVELY. Well, he cannot appoint without your help.

Senator HEFLIN. There was some talk about the question of a Supreme Court, and such inferior courts, that this might have some constitutional aspect.

I suppose, in effect, this could be labeled "The U.S. Court of Appeal, Intercircuit," as well as the U.S. Court of Appeals, and I believe that the Supreme Court's authority to review decisions of this intercircuit panel is the same as they have pertaining to the fifth circuit, eleventh circuit, sixth circuit.

Judge LIVELY. I agree. It is definitely an inferior court because anything it does is subject to review by the Supreme Court.

Senator HEFLIN. I have no other questions.

Senator EAST. If I might just make a brief observation. I am fully aware of what you two gentlemen are saying about judicial activism, but it seems to me you can make a tenable case that the Court, particularly in the 20th century, has involved itself in areas that, historically, it had found taboo, because they were seen as political issues.

It just occurs to me that increasingly, at least as members of legislative bodies can see it, you find the Court presenting us with major policy decisions that I suspect—though one does not know, of course, with great certainty—that many of the framers would have been rather surprised by. Thomas Jefferson, I think, would have been, as I say, rather surprised.

It seems to me that at some point the Court runs the risk, from a separation of powers standpoint, of emerging as the Nation's primary policymaker.

I am aware that you cannot have literal and total compartmentalized separation between the three branches of the Federal Government, but it does seem to me, at some point you can wonder whether the Supreme Court, as an entity, has not involved itself in areas that, historically, it had not seen fit to do, and increasingly, we see it as the major policymaker in the American system. I think that that it is somewhat disconcerting in view of the constitutional concept that the Congress, as the legislative body, is the fundamental policymaker.

So, acknowledging, granting, agreeing that judicial activism is perhaps a vague and loaded term, I do not think we can fully escape the question of whether the Court's increasing involvement in so many areas of policymaking has not in itself generated this avalanche of cases. At least I have somewhat of a gut feeling that that could be the case.

Judge LIVELY. Well, I might make just one comment. Of course you referred to Thomas Jefferson, and as a graduate of his law school, I have always understood that, earlier on, he was a very strong supporter of the Supreme Court, but when his cousin John Marshall began to take the Court in directions that he did not approve of, he became a strong critic of the judiciary.

There has been no more activist judge in the history of the United States than John Marshall. He completely redefined the role of the Supreme Court in the eyes of many people, including Thomas Jefferson. As I said in answer to Senator Heflin, I believe there are recurring themes, and there are ebbs and flows. Of course, judicial activism exists. I do not deny that for a minute. Obviously, it does.

But I think that there are times when it is at a high level and times when it is at a low level, and the next court after the present court may go to a low level of activism.

Senator EAST. Thank you, Judge.

Judge LIVELY. Thank you again, sir.

Senator EAST. We appreciate your coming.

Senator HEFLIN. I might comment regarding judicial activism—and I do not mean this to be derogatory of anybody—but if the workload of Justice Douglas was an impediment to his activism, I believe he would have found that he would have climbed one less mountain. [Laughter.]

Senator EAST. Our next panel includes the Honorable Roman Hruska, a former member of this body. We are delighted to have him back and appreciate his coming to join us, and he has served on the Judiciary Committee and he is a well-known and articulate statesman.

We welcome him this morning. We also have the Honorable Daniel Meador, who is professor of law at the University of Virginia and a former Assistant Attorney General of the United States, and Mr. Leo Levin, who is director of the Federal Judicial Center.

Gentlemen, we welcome you this morning and appreciate your coming and sharing your thoughts with us.

So, any way that you would like to proceed, please feel free to do so.

STATEMENTS OF A PANEL CONSISTING OF HON. ROMAN L. HRUSKA, OF KUTAK, ROCK & CAMPBELL, OMAHA, NE; HON. DANIEL J. MEADOR, PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA; AND A. LEO LEVIN, DIRECTOR OF THE FEDERAL JUDICIAL CENTER

Mr. HRUSKA. Thank you, Mr. Chairman.

I was both privileged and highly pleased to receive the invitation to come here. I always am. The premises and the environment here are very familiar. I am especially pleased that this invitation is on the basis of the continued interest of this committee to establish an intercircuit panel of the U.S. Courts of Appeals.

It is heartening to note that when the chairman of this committee, Mr. Thurmond, introduced the subject bill for himself, he also named Mr. Heflin——

Senator EAST. Senator, excuse me, if I might interrupt for a moment. I am very sorry to have to do this. We have a vote going right now. Senator Heflin and I thought we could go over quickly, vote, and then come back, and then I think we will be safe for a while, and rather than get too far into this and then have to move out on you, I think maybe it would be prudent if we did that right now.

So I apologize to you. You know well how the institution works. It is sheer bedlam, but I guess we cannot change that, either.

Senator **Heflin**. Well, this group has testified on this issue I believe about four times, and maybe it is a different—maybe not all together as a panel, and so they have experienced this problem, and Senator Hruska of course is an old hand with Senate procedures, and knows all about votes and interruptions at committee hearings. So we appreciate your being here. We will try to get back as soon as we can.

[A vote recess was taken.]

Senator **East**. The subcommittee will come to order.

I have been advised that Senator Heflin would not object to our proceeding, as I did not when he returned earlier than I did at the last break.

So, gentlemen, again, we apologize for the interruption and appreciate your being with us. Senator Hruska.

Mr. **Hruska**. Mr. Chairman, continuing the statement I want to say that it was heartening to note, that when the chairman, Mr. Thurmond, introduced the instant bill, he did so for himself, and Senators Heflin, Dole, Simpson, Laxalt, Hatch, Denton, Specter, McConnell, DeConcini, and Hatfield. Frankly, Mr. Chairman, the appearance of those names serves to enhance my pleasure and appreciation for the invitation to come here, because it does indicate, it seems to me, a broadened support for this proposal.

This is not the first time, Mr. Chairman, that I have appeared before this committee on the idea of enlarging the appellate capacity of the Federal judicial system. However, today I will not talk about the "National Court of Appeals."

It is not that I have lost faith in it. It is not that I am disloyal to the recommendation of the Hruska Commission. But it is obvious to anyone who is politically realistic, that we have passed the point now of considering that proposal, but we have a new avenue to gain the goal that we have before us.

In order to obtain a proper perspective, I might say that back in 1975, when the report of the Hruska Commission was filed, the Chief Justice, in a letter to the Commission said this:

> Up to now I have neither advocated the creation of an intermediate court nor expressed any view, but I have no hesitation in stating, now, that if other remedial measures are not adopted, the creation of such a court is inevitable.

He went on to say 8 years later:

> It is fair to say that four or five members of the Supreme Court—at that time—were in general agreement with the diagnosis of the problem made in these two important reports, the report of the Paul Freund Committee, and the Commission on Revision.
>
> However, when no consensus, either within the Supreme Court, or within the legal profession emerged, I concluded that I had no choice but to await events, keep a watchful eye on the docket, and from time to time draw the subject to your attention. I have done that. Today I do it again.

That was in 1983 in New Orleans, the midyear meeting of the American Bar Association. Later in that speech, he said:

Individually, we on the court have "nibbled around the edges" of our dilemma for a dozen years without coming as near to the heart of the problem as either the Freund committee or the Hruska Reports. But I am happy to observe that in recent months, all members of the Court who have spoken on the subject, now a clear majority of the Court, are essentially of one mind: that there is indeed a grave problem and that something must be done.

Not being able to make any progress with the idea of a national court of appeals, this later approach, as expressed in S. 704, is very good.

It is an excellent response to the present widely held state of mind, which insists that something must be done to cope with the Supreme Court caseload and its related problems.

It is a measure which I can fully endorse and support with assurance that it is a step in the right direction. Its provisions reflect and include revisions in response to objections that were raised against various previous bills.

It is thoughtfully balanced in anticipating and providing for a number of contingencies which could develop into sources of potential difficulties.

It is worthy of support from those who are interested in an experimental and temporary measure, as a guide to the formulation of a permanent arrangement should its operation prove beneficial and sound.

I might comment on just two or three of the aspects of the bill, Mr. Chairman.

First: The matter of time during which the panel would initially function. How much time should the panel be given? Five years is provided in the bill. But 7 years would be much better. If the experiment is working properly, 7 years will not hurt.

If it is not working properly, and if something has become objectionable, there is an easy answer.

There Supreme Court can either reduce the referrals, or it can send no referrals, and automatically, the operation of the panel ceases. The provisions for a 5-year term, moreover, requires the panel to make a report to Congress at the end of 4 years. That necessarily will eliminate the proceedings in the 5th year. A 4-year tenure is the result—much too short.

Second, as to the problem of petitions for certiorari, the Hruska Commission considered the question, and has been supported in the conclusion that was reached by various pronouncements from members of the Supreme Court.

There would be no occasion for the Supreme Court having once decided that a case should be referred to the panel, they would be disposed to take on a reconsideration once again, unless the circumstances were just totally, spectacularly wrong. The likelihood would be small and in fact negligible that such reconsideration would occur.

Third, as to the kind and number of cases. Should there be a provision in the bill prescribing only a definite type of case can be referred to the panel?

The Supreme Court has been in existence for a long time. We should accord them considerable and competent knowledge about how the Supreme Court should be operated. It should be left to exercise broad discretion on this point.

The members of the panel will be seasoned circuit judges. It seems to me that the more flexibility we can give to the Supreme Court in this aspect, the less the danger exists that there will develop challenges to jurisdiction of the panel as a result of wrongful assignment. The Supreme Court should not be hedged in by any statutory limitations on the kind of cases that should be referred to the panel.

Fourth, a question recurs frequently: This panel would be another tier of courts. I do not believe it, Mr. Chairman, for the reasons that I have already cited. It will not be a fourth tier. There is precedent for it. There are other panels that have been used, and successfully. With the Supreme Court in full control of its docket by way of referral, there cannot well be a fourth tier. Sometimes it is contended that this panel, after all, cannot do this or cannot do that.

It was with interest that I listened to the testimony of the Department of Justice. If we were to wait until all the necessary reform, in other areas of the law, to fully cover every possible contingency before we adopt any change in the law, we will never get to a point of decision on any proposal.

Going on just a little further, if we deny the Supreme Court an increase in its capacity for an additional number of cases and decisions, we do not reach the crux of the problem, because then the status quo prevails, and what is it?

We have 13 circuits, each of which has the prerogative of making a final decision that in all likelihood will never be reached for review. The result is a vast disparity of applicable law which is not desirable in a nation where we have the mandate for a uniform nationwide national law applicable to like situations. In this respect the panel and the Supreme Court, working together, will be very useful in achieving the mandate for uniformity of decision binding in all States.

I see the yellow light on. I defer any further remarks for response to questions that might be asked by members of your committee, Mr. Chairman.

[Prepared statement follows:]

PREPARED STATEMENT OF ROMAN L. HRUSKA

MR. CHAIRMAN:

It was with pleasure that I accepted the invitation to appear before this Committee on behalf of its continued efforts for enactment of a Bill to establish an "INTERCIRCUIT PANEL OF THE UNITED STATES COURTS OF APPEAL." (S. 704)

It is heartening to note that the Chairman (Mr. Thurmond) introduced the Bill "for himself, Mr. Heflin, Mr. Dole, Mr. Simpson, Mr. Laxalt, Mr. Hatch, Mr. Denton, Mr. Specter, Mr. McConnell, Mr. DeConcini and Mr. Hatfield."

The appearance of these names serves to enhance my appreciation for this opportunity to come before you today.

Mr. Chairman, considerable progress has been made and witnessed by your Committee since it undertook to improve and update structural and procedural features of the federal court appellate system.

Over the past fifteen or so years, some of the events which can be viewed as leading to this day's hearing and specific pending Bill, would include: The American Law Institute 1969 Report and Survey; the Rosenberg Committee Report, chaired by Professor Maurice Rosenberg of Columbia Law School; The Freund Advisory Group Report of 1972, chaired by Professor Paul Freund of Harvard Law School; Commission on Revision of Federal Court Appellate System, which made its Report in June, 1975.

Also, Re-alignment of the Fifth Circuit Court, with formation of a new, additional Circuit; and Establishment of the Federal Circuit Court for the District of Columbia.

But history and current events show that fundamental change in the federal judicial system moves very slowly indeed.

Shortly after the turn of the 19th century, the need for Circuit Courts of Appeal was perceived, and their establishment was proposed and advocated. It was not until 1891 that the Circuit Court of Appeals Act of 1891 became law — some 75 years later.

The situation in the years preceding 1891 was a massive overload of cases in the Supreme Court.

That is the problem today. The record on this Bill and previous measures along the same line, is replete with the necessary statistics and other details. I shall forego the exercise of adding any additional material.

It is earnestly hoped that a re-enactment of a 75-year period will not be necessary in the instant situation.

There are signs for a happier and earlier conclusion on S. 704. The past 15 years have witnessed the building of a vast and varied literature on the subject; some kindred legislation has been enacted; and there is on stream an increased vigor, volume, and intensity of discussion and debate in progress. There exists room for cautious optimism for enactment of this or similar legislation soon.

That patience and persistence are of high virtue and necessity in matters such as confront us today is well illustrated in the following: The June 1975 Report of the Commission on Revision recommended a National Court of Appeals as an intermediate court. Request for comment on it was made to Chief Justice Burger prior to final draft. His letter is a part of the Report Appendix. In part it reads:

> ". . . Up to now I have neither advocated the creation of an intermediate court nor expressed any view, but I have no hesitation in stating, now, that if other remedial measures are not adopted, the creation of such a court is inevitable. . ."

Eight years later (in the American Bar Association Mid-Year Meeting in New Orleans on February 6, 1983) the

Chief Justice spoke on that same subject. He called attention to the Freund Committee Report (1972), followed by the Hruska Commission Report (1975), and went on to say:

> "It is fair to say that four or five members of the Supreme Court at that time were in general agreement with the diagnosis of the problem made in these two important reports. However, when no consensus either within the Supreme Court or within the legal profession emerged, I concluded that I had no choice but to await events, keep a watchful eye on the docket, and from time to time draw the subject to your attention. I have done that. Today I do it again. . ."

Later in that same February 6, 1983 speech, he spoke as follows:

> ". . . Individually we on the Court have "nibbled around the edges" of our dilemma for a dozen years without coming as near to the heart of the problem as either the Freund Committee or the Hruska Reports. But I am happy to observe that in recent months all members of the Court who have spoken on the subject — now a clear majority of the Court — are essentially of one mind: that there is indeed a very grave problem and that something must be done.
>
> "I assure them — and you — that I warmly welcome this concern in what we know is an old problem. The Justices may not agree as to particular solutions, but all who have spoken agree generally on the diagnosis of the structural illness. Now that the diagnosis has been made it is time to turn our attention to the remedies. I hope this will be done — and done very soon — by an independent Congressionally authorized body appointed by the three Branches of the Government."

Subsequently in that address he went on to describe and advocate a proposal for a Temporary Panel of the United States Courts of Appeal which, in thrust, was pretty much along the lines of the Bills on the same subject introduced in both Houses of Congress in 1981 and again in 1983.

AN EXCELLENT RESPONSE TO INSISTENCE THAT "SOMETHING MUST BE DONE."

S. 704, A Bill to Establish an Intercircuit Panel of the United States Courts of Appeal, is an excellent response to the present widely held state of mind which insists that "Something Must Be Done" to cope with the Supreme Court case load and its related problems.

It is a measure which I can fully endorse and support with assurance that it is a step in the proper direction.

Its text and arrangement reflect and include many considerations which were raised in various previous bills. It is well and thoughtfully balanced and rounded out in anticipating and providing for a number of contingencies which could develop into sources of potential difficulties.

It is worthy of support from those who are interested in an experimental and temporary measure as a guide to formulation of a permanent arrangement should its operation prove beneficial and sound.

GENERAL OBJECTIVES OF AN INTERCIRCUIT TRIBUNAL

With due effort to avoid appearing presumptuous, I respectfully set out some thoughts on the subject of the place and purpose of such a Tribunal. Parenthetically, permit me to say that these observations and conclusions are the product of long experience with the general subject matter over a period of years.

Earnest consideration should be given to confer on the Tribunal such powers, qualifications, and position that will enable and induce it to achieve these general objectives:

* * * Function as "an overflow chamber" of the Supreme Court.

* * * Develop a stability and continuity of doctrinal policy consistent with the general approach of the Supreme Court.

* * * Suitably assist in the direction and goal of a uniform, clarified, and stable national case law.

SOME IMPLICATIONS OF SUCH OBJECTIVES

The tribunal will be engaged in adjudicating highly important and urgent cases which the Supreme Court regards as poignantly demanding decisions, but which the Court itself is helpless to reach on account of the sheer massiveness of its case load.

Inasmuch as the Tribunal would be engaged in tasks which the Supreme Court itself would perform if it had the time, it follows that the efforts and the end results achieved by the Court and the Tribunal are in high degree equal in importance and significance.

Hence, the Tribunal should be endowed with structure and equipage which will enable it to fulfill its role on a high level of excellence in keeping with the quality output of the Supreme Court itself. That excellence should be such as to warrant and receive approval and confidence of the Supreme Court; and the respect of the litigants, the profession, and the public which the judicial system serves.

Such endowment of attributes would not be for cosmetic or superficial purposes. It would be based upon the necessity that the Tribunal possess and be able to exercise powers, prerogatives, characteristics, and instrumentalities which will enable it to function with the effectiveness expected of it; but which will in no way impinge upon the position and preferments which belong solely to the Supreme Court.

Life of the Panel is one of the hallmarks of an experimental status. The five-year term is not too long, but it will furnish a suitable basis for appraisal of the value of future legislation. In addition, should the Panel's operation lapse into an unsatisfactory or objectionable state, the Supreme Court possesses the authority to reduce referrals, or even discontinue them.

Member selection of the Panel by the entire Court should serve well to assure balance in the choices made. It should also serve to instill and maintain the Court's confidence in the Panel.

Membership of nine and en banc requirement should produce a collegiality as well as broader perspectives, both of which are desirable. A broad discretion vested in the Court as to the kinds of cases to be referred should be retained. That flexibility will be useful. Experience will soon develop the limits, if any, which need be placed on such action.

There should be little if any concern about potential petitions for certiorari filed with the Supreme Court following decision by the Panel. After all, the Supreme Court in making the referral makes the decision not to review the case. Except for very unusual circumstances, there is small likelihood of changing its mind and granting the petition. Nevertheless, the provision for petition for review must be retained.

WILL THE PLAN WORK?

Last February, in the Detroit Mid-Year ABA meeting, the Chief Justice put it this way:

> Will this plan work? There, I must be completely candid: I do not know. No one can really know with certainty. That is why we need to experiment for a few years, and if we find the Panel works, it can be continued in this form. If after two or three years, we conclude that it is not helping, we can abandon it. In any event the statute would have a five-year "sunset" provision. Until someone comes along with a better idea, I submit that this is worth a try."

The Senator from Alabama (Mr. Heflin) one of the Bill's sponsors and introducers, put his answer in a slightly different fashion in his floor statement upon its introduction:

> ". . . There is a possibility the panel will not be successful. If not — we will have learned something. There is also the possibility that the panel will be successful. If so — we have accomplished something. Either way, we gain from the experience. The bigger risk comes in doing nothing at all."

Senator EAST. All right. Thank you, Senator Hruska.

STATEMENT OF A. LEO LEVIN

Mr. LEVIN. Mr. Chairman, Senator Heflin, I am deeply honored to be here to testify in support of S. 704, and to share with you a few thoughts concerning this bill.

I have prepared a written statement and in view of the comprehensive, and to me persuasive statements that have already been made during the course of the hearings this morning, I would like to limit myself to three brief points and then be subject to any questioning that you might care to have.

Point 1. Justice White was asked, at an appropriations hearing of this body, his view concerning whether or not the problems of the Supreme Court could be solved by their taking fewer cases. He answered in unequivocal terms, and presented statistics in support of the need for an intercircuit panel, which I find totally persuasive. The details are in my written statement.

And I would like to emphasize, without rehearsing the numbers that are set forth in the statement, that they indicate that there is a great deal that such a panel could accomplish.

The point I would like to emphasize is that what he was working from at the end of the term—not quite at the end, it was still mid-June—what he was working from was votes by the Justices—not only himself, but others—that had been publicly recorded on the issue of denial of certiorari. His analysis demonstrated that these Justices, voting for the purpose of action to be taken by the Court, had really, I think, demonstrated the lack of capacity in the Court to handle the problems in the system.

Second point, if I may. One of the things emphasized in the Hruska Commission Report, but I do not think really adverted to this morning as yet, is the problem of relitigation, which arises when no conflict develops, or virtually no conflict develops.

And let me give you one example that is discussed in a recent law review article. Under the postal statute, as it was passed when the Postal Service was created, there arose the issue of the garnishment of the wages of U.S. Postal Service Employees. Were the wages subject to garnishment or not?

Before the question was disposed of by the U.S. Supreme Court—and that only recently—20 district courts and 7 courts of appeals had to address that question. Consider the great waste over the interpretation of a simple statute. There was no great principle at stake in which way it would be decided, but it had to be decided definitively.

And this involves also the Department of Justice's relitigation policies. They are lawyers. They do not like to accept an adverse decision by one circuit, when they can go to another circuit.

This example illustrates two things, and it is not the only example. First, the harm to litigants that comes from the lack of capacity in the system to decide issues definitively and to avoid useless relitigation.

Second is the waste to the system from the relitigation of such issues. Not that they are of great transcendental importance; not that the Republic will crumble if these issues get relitigated time and again; not that it is going to threaten tbe body politic. But if we are looking for an efficient system that serves the citizens of the country without needless waste of resources, relitigation on issue after issue of that type is something that should be avoided, if we can.

Last point. Mr. Chairman, if I may, I would like to emphasize again the nature of the experiment. Senator Hruska has adverted to it; some others have as well.

It is the creation of a panel of circuit judges, in many ways similar to judges sitting by designation, such as goes on in the Railroad Court, such as goes on on the Panel on Multidistrict Litigation.

But sitting by designation under this bill would be by designation of the Supreme Court. And a majority of the Justices have said publicly: Give us this option of referring a certain number of cases to such a panel. I think it is highly desirable that the Congress, in the interest of experimenting, give the Court the option that a majority of the Justices say will help them.

Will it work? I think so, but that is not the issue. As has already been pointed out, if it does not work, all the Justices have to do is to stop referring cases. There is nothing in the system that says the experiment must run for 5 years.

If it works very well, more and more cases will be referred down. You could not have designed a better system for experimenting than one in which the very progress of the experiment depends upon the perception of success.

Thank you very much for this opportunity to share these thoughts with you.

I and my colleagues on the panel, with whom I am very honored to be associated, will hold ourselves ready for response to any questions you may have at the conclusion of Professor Meador's testimony.

[Prepared statement follows:]

PREPARED STATEMENT OF A. LEO LEVIN

My name is A. Leo Levin, and I serve as Director of the Federal Judicial Center. As you are undoubtedly aware, but as I am bound to add, on matters of policy the Federal Judicial Center speaks only through its Board, and I am present here this morning only in an individual capacity.

The need for additional appellate capacity in the federal judicial system was set forth in the Report of the Commission on Revision of the Federal Court Appellate System, more commonly known as the Hruska Commission after its chairman, Senator Roman L. Hruska. That report, built in part upon the work of the Freund Study Group, led to the introduction of various bills which became the subject of hearings before committees of this body and the other body during the course of the intervening decade. Improvements and refinements were introduced, and I believe that S. 704 reflects the best of the various proposals and merits prompt enactment. (A minor suggestion that may merit consideration by the draftsman is appended in a footnote.*) I would like to describe briefly some new material, which I believe further underscores the need for the Intercircuit Panel.

Toward the end of the Supreme Court's 1984 Term, i.e., in the spring of 1985, Justice White was asked whether the need for an "Intercircuit Tribunal" could "be eased simply by the Court exercising greater selectivity in accepting cases." His response was unequivocal:

> Decidedly not. The Supreme Court can hear and decide only about 150 cases each term. In my judgment it is now denying certiorari in many other cases that should be reviewed. Hence, the chief justification for the Intercircuit Tribunal is to provide a court to which the Supreme Court could refer cases that it does not have the capacity itself to hear and decide. For the Court to turn down still more cases than it now does would obviously not cure, but exacerbate, the problem. The attached addendum more fully states my views.

The following relatively brief extract from the addendum provides both a statistical summary and the underlying rationale for the need for S. 704. It bears considerable emphasis that the votes of the justices that are set forth were all matters of public record, and that they are based on decisions made for the purpose of official judicial action. Justice White adds:

> During the 1984 Term, I publicly dissented 54 times from the Court's refusal to review a case raising an issue that I believe it should address: 27 times I wrote and published a dissent from denial, twice I joined similar writings by other Justices, and 25 times I noted on the public record, generally without explanation, that I would grant certiorari or note probable jurisdiction. In 18 of these dissents I was joined by one other Justice and in 13 by two. As of June 24, there were 69 additional cases in which another Justice, by himself or with others, publicly noted his dissent from the Court's refusal to review. There were also many instances in which one or more Justices voted to grant but did not note this fact on the public record. I shall, however, confine the following discussion to the cases in which I, with or without others, publicly dissented from the refusal to grant plenary consideration.
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> The bulk of these 54 cases involve conflicts or confusion among the lower courts. By my count, the Court has turned aside 33 such cases. Twenty-nine of these--twenty-three statutory and six constitutional cases--involved flat conflicts between the lower courts on a specific statutory or constitutional issue. In four other cases there was obvious confusion among the lower courts over the construction of a federal statute or the Federal Constitution. The rest of the 54 cases involved decisions on statutory (9) or constitutional (11), or admiralty (1) issues of sufficient importance to merit review, and included some decisions that to my mind were of doubtful validity.
>
> At least six members of the Court concluded that none of these 54 cases deserved plenary consideration. But denying review of decisions that conflict with other decisions of Courts of Appeals of State Supreme Courts results in the federal law being enforced differently in different parts of the country. What is a crime, an unfair labor practice or an unreasonable search and seizure in one place is not a crime, unfair practice or illegal search in another jurisdiction. Or citizens in one circuit do not pay the same taxes that those in other circuits must pay. It may be that occasionally it would be of use to leave a conflict unresolved in order to await the views of other courts; but for the most part, the conflicts that we turn down are not in that category, and they invite prompt resolution in this Court, which now is the only forum that can provide nationwide uniformity. And this is to say nothing of those cases involving no conflict but

> obviously important statutory or constitutional issues that warrant authoritative review.

The Hruska Commission report, referred to earlier, pointed out that one of the unfortunate results of inadequate appellate capacity in the federal system is relitigation of the identical legal issue in circuit after circuit even where no conflict develops. Because the Supreme Court is unlikely to review statutory decisions by the courts of appeals in the absence of intercircuit conflict, litigants who have a stake in a particular issue are virtually invited to relitigate the issue in another circuit upon receiving an unfavorable ruling. One of the examples discussed in a recent study concerned the immunity of the United States Postal Service from state garnishment proceedings. Before the issue was finally put to rest it had been addressed 20 times in district courts and seven times by courts of appeals. (*See* Levin and Leeson, *Issue Preclusion Against the United States Government*, 70 Iowa L. Rev. 113, 128 n. 114 (1984).) Moreover, the issue involved is a perfect example of the kind of case that could and should be referred to an Intercircuit Panel, effecting a significant reduction in such wasteful relitigation. To quote again from Justice White's addendum:

> Most such [run-of-the-mill statutory] cases do not involve questions of surpassing importance or present any special need for the attention of nine Justices to ensure the "correct" result. Rather, the need is to arrive at a satisfactory, uniform construction of a particular statute.

Some observations on the workload of the Court and the relationship of that workload to the present bill may be helpful. The Court today hears about 150 arguments a year. It is generally recognized that the Court should not undertake to hear any greater number. As Justice William J. Brennan, Jr. observed only three years ago: "There is a limit to human endurance, and with the ever increasing complexity of many of the cases that the Court is reviewing in this modern day, the number 150 taxes that endurance to its limits." One hears no dissent from within the Court with respect to that proposition, details aside. Nor do I believe that it is in the country's best interests for the justices to be operating, year after year, at the limits of endurance, however those limits be defined.

There is a finite amount of time available to each justice to devote to the judicial work of the Court. Since the demands upon the Court are far greater than the Court can accommodate, the justices are forced to make decisions in the nature of trade-offs. They can vary the number of cases that they hear and decide, although there are no suggestions from within the Court that the number of arguments be increased. On the contrary, there have been public suggestions from within the Court that it might be well to consider returning to the standard of about 100 cases per year that prevailed for some 15 years until 1970. (In this connection, I should note that more than one justice has publicly expressed concern that, over the long run, the quality of the Court's work is threatened by the volume of judicial business which the justices feel obligated to accept.) The justices can resort to summary processes, including reversals with neither oral argument nor full briefing. Again, there are indications from within the Court that resort to these processes is a result of workload. However justified the result in any or every case, it seems doubtful that these processes would be utilized to the extent they are absent time constraints.

The majority of the justices seek to experiment with an intercircuit panel because they see in such a panel a means of adding to the decisional capacity of the system.

Whether, if such a panel is created, the Court would continue to hear as many cases as it does, whether the justices would be able to reduce the number of separate concurrences by spending more time working out mutually acceptable majority opinions, or whether more time would be devoted to individual cases, is impossible to forecast. Moreover, the justices should not be obliged to suffer a schedule that "taxes [human] endurance to its limits." There is no point in crushing the members of the Supreme Court under the maximum possible workload when there are preferable alternatives available.

A final word. A majority of the justices favor experimenting with the proposed Intercircuit Panel precisely because it is an experiment, because this bill has a sunset provision. Moreover, this is an experiment that the justices themselves can terminate any time they so choose by the simple expedient of not referring any more cases to the Intercircuit Panel. If the existence of the Panel proves useful, the justices will continue to utilize it. If not, they will not. This Bill gives the Court an option. The Congress should not deny that option to the Court.

I would be pleased to try to respond to any questions you might have concerning this testimony.

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*Section 4 of the bill would provide in 28 U.S.C. § 1260(a) that the Supreme Court may refer any case to the Intercircuit Panel "after . . . denying certiorari." I would think it preferable not to provide for reference after the Supreme Court has denied certiorari. That denial should be final. In this connection, I note that where the Supreme Court has referred a case prior to acting on the petition for certiorari, the Intercircuit Panel would be empowered to decide the case or to "deny review." 28 U.S.C. § 1272(a) as set forth in Section 4 of the bill. Thus, this provision for reference after denial of certiorari would appear to be both unnecessary and unwise.

Senator LAST. Thank you, Mr. Levin.
Professor Meador.

STATEMENT OF DANIEL J. MEADOR

Professor MEADOR. Mr. Chairman and Senator Heflin: I am privileged to be here also today to participate in this discussion. I have filed today a written statement with the subcommittee and would appreciate its being included in the record. I am also doubly privileged to be associated with these two gentlemen here on this panel. There are no two persons in the United States who have invested more time and thought on this subject than they have. Senator Hruska chaired the Commission in the 1970's and Mr. Levin was the executive director of it, and it was their work on that Commission that really put this subject before the country, and is largely responsible for our being here today.

After all, we should remember that here today we are sitting on top of 14 years of study and debate and hearings in Congress. It is out of that process that S. 704 has evolved.

During the 1970's, in the wake of the Hruska Commission work, I gave a lot of thought to this problem. I studied their report quite carefully, and I confess to having been torn a bit, back and forth, on what I thought about the merits of the idea. Eventually I came to see, after about 1980, that we could not afford simply to keep on debating, that something needed to be done. The emergence of a proposal to create a panel of existing U.S. circuit judges, sitting by designation, to help the Supreme Court and to help the entire Federal judicial system by increasing appellate capacity, struck me as a happy way to get off out of dead center.

S. 704 is a finely tuned bill that has profited from all the hearings that have gone before. It has met numerous objections that were voiced earlier. Indeed, it seems to me to have overcome essentially all objections of real substance. What it does is provide the Supreme Court with a tool to attempt to address these problem. How well and how wisely the Court uses it, and how it works, remain to be seen. No one knows. No one who has testified here today, and no one in the United States knows how it really will work, to what extent it will help the system, or to what extent it has "bugs" in it, or exactly what the procedures will be under it. That is what we will find out.

It seems to me fruitless to debate questions about whether it will work or whether it will not. We want an experiment to see. It is easy to describe scenarios under which it will not work—under which it will be counterproductive or will create more work for the Supreme Court. It is also easy to describe scenarios under which it will work, can work, and might be of great benefit to the country. So I would like to see it put in place. The saving grace is the time limit on it and the fact that the Supreme Court can simply stop using it at any moment.

There is only one provision in the bill, other than a few stylistic points which I am communicating to the staff, where I would suggest a modification. The point has already been made by Senator Hruska. It concerns the duration of the panel. I sense that the drafters of the bill thought a 5-year period was an appropriate experimental run. I agree that 5 years is a good period of time within which to determine how this apparatus works. My problem is that I do not think that a 5-year life of the panel will give us a 5-year base of experience. The first year will largely go by with startup problems, a "shakedown run," so to speak—devising procedures, deciding the first group of cases, getting those decisions out, et cetera. It will not be a typical year. It will not be a good year on which to base judgment. The report must be submitted 1 year before the termination of the panel so Congress will have time to evaluate the experience and to decide what to do. So in order to get 5 years' experience, the panel needs to have a 7-year life, and that is what I would suggest, although I would not want to run the risk of derailing the bill in any way. Five years would be perfectly acceptable, in my sight, if we cannot get 7.

Let me mention one or two other points that have come out of the discussion here that deserve a word of comment. The bill authorizes the Supreme Court to designate the judges. I see no constitutional difficulty with that whatsoever. For 60 years now, since the 1920's, we have had designations of judges to sit on courts other than the courts to which they were nominated, confirmed, and appointed. Some have been mentioned already. We have intercircuit assignments. We have assignments to TECA, to the wiretap court, to the multidistrict panel, et cetera. This is now very familiar. The power to make those assignments is vested solely in the Chief Justice. This bill does better by placing the power in the Supreme Court as a whole. It seems to me that it is late in the day to suggest any constitutional difficulty in the assignment of Federal judges to perform duties of a judicial nature on article III courts or forums other than those to which they were originally appointed.

The collegiality argument also strikes me as one without much force, although I am not a judge and perhaps should be hesitant to speak on it. The idea that because one's colleagues are sent on other assignments one somehow seems denigrated does not seem to work in actuality. In the snows of the Northeast in January, a fellow circuit judge may be sent to Phoenix to sit for a week or two. This surely picks him out for some distinction not shared by his colleagues. A circuit judge may be designated to sit on TECA, in which he decides energy-law cases with nationwide binding effect, a much more far-reaching kind of jurisdiction, one might argue, than that exercised by a regional circuit. Circuit judges are selected to chair committees of the Judicial Conference, giving them a distinction and influence and authority not shared by their colleagues. These things go on all the time and they do not seem to pose any serious problems of collegiality. To the extent that there may be collegiality problems, this is a price to be paid for the benefit of getting the results of this experiment.

Now to conclude, I believe we will learn a lot by putting this tool in the hands of the Court. We may learn unexpected things—whether, for example, we need to create more forums on the model of TECA or on the model of the U.S. Court of Appeals for the Federal Circuit. Or we may learn that we want to continue this panel or some variation of it. All of these things we may learn. We do not know what we will learn. But it does seem to me that we ought to move ahead now to set this panel in place, get the results, and then determine where we are.

In no way do I want to imply that all of the other things that have been suggested should not be done. I think almost all of them should be done. We need to eliminate mandatory Supreme Court jurisdiction, curtail diversity jurisdiction, study the idea of subject matter organization within the existing appellate courts, and many other things. These are not mutually exclusive ideas and remedies. They probably all need to be done, and more too, but that is no reason for now stopping and saying, "Let's not create the intercircuit panel because we havn't done everything else first." The legislative process does not work that way. Here we have a very modest idea capable of producing a lot of useful experience, and I would like to urge the Senate to move along with it.

Thank you, Mr. Chairman. I will be happy to answer any questions.

[Prepared statement follows:]

PREPARED STATEMENT OF DANIEL J. MEADOR

Mr. Chairman and Members of the Subcommittee:

I appreciate the invitation to submit my views on S. 704, a bill to create, on an experimental basis for a limited time, an Inter-Circuit Panel of the U.S. Courts of Appeals. The proposal embodied in the bill is aimed at ameliorating two serious problems in the federal judiciary: (1) the unreasonably heavy burdens on the Supreme Court and the difficulties being encountered by the Justices of that Court in giving adequate, reflective time to the important issues with which they should deal; (2) the lack of capacity in the federal appellate structure to deliver the number of decisions on federal law--mainly on questions of statutory construction--that are desirable in order to maintain a reasonable measure of nationwide uniformity in the administration of federal justice. The Inter-Circuit Panel provided for in this bill is a promising device for attacking these two related problems, and the experimental run provided for should enable us to determine its effectiveness. Thus, I urge enactment of the bill during the current Congress.

To heighten the likelihood of determining whether the Inter-Circuit Panel is an effective device there are certain key features that should be embodied in its composition, jurisdiction, and procedures. This bill embodies all of these features, and I deem all of them essential to the success of this experimental venture. These features are:

- The Inter-Circuit Panel would consist of 9 circuit judges, with 4 circuit judges in reserve available to sit when one or more of the 9 is disqualified or unavailable.

- The 9 circuit judges and 4 reserve circuit judges would be designated by the Supreme Court from among the circuit judges of the country in either active or senior status; such designations would be for a period of years, with a gradual, staggered rotation among the judges of the panel.

- The nine-judge panel would sit en banc in every case.

- The Inter-Circuit Panel would have jurisdiction to decide any case referred to it by the Supreme Court, and the Supreme Court would have authority to refer any case to the Inter-Circuit Panel, either before or after granting certiorari or noting probable jurisdiction.

- The Supreme Court would have jurisdiction to review on certiorari any decision of the Inter-Circuit Panel.
- The Inter-Circuit Panel would terminate at the end of a specified period of years; reports on its work would be rendered annually, and a comprehensive report on its work would be submitted one year prior to its termination.

To alter any of these features would endanger the prospects for this panel to achieve the 2 objectives at which it is aimed and would impair the validity of the experiment.

To understand the nature of this panel and its potential role in the federal judicial system it is necessary to understand that it is not designed to be a separate, independent court of the sort to which we are accustomed in the federal judiciary. Rather, the panel is designed to be an adjunct to the Supreme Court. It can properly be thought of as an overflow chamber for the Supreme Court-an agent, so to speak, of that Court. Its primary mission is to render decisions on federal law questions with nationwide binding effect of the sort that the Supreme Court itself would render if its workload permitted it to do so. For this reason, the judges should be selected by the Supreme Court in order to ensure, as far as humanly possible, that there is a harmony of jurisprudential attitude and approach to resolution of federal law questions between the Inter-Circuit Panel and the Supreme Court. To provide stability and predictability, the panel should sit en banc in every case, and its membership should not be frequently shuffled.

The bill is sound in not placing any restrictions on the types of cases that the Supreme Court can refer to the Inter-Circuit Panel. Although it is envisioned that likely candidates for such referral are cases in which the Supreme Court perceives an inter-circuit conflict, numerous other cases may be referred where there is simply need for clarifying a question of federal law even though at the moment no inter-circuit conflict exists.

Moreover, the Supreme Court should be given leeway, as it is in this bill, to establish an internal procedure whereby cases can be referred by categories to the Inter-Circuit Panel, leaving it to that panel whether to grant or deny certiorari; if the panel grants certiorari it would then proceed to decide the merits of the case. Whether referring cases individually or categorically by the Supreme Court is preferable, would be part of the experiment to be undertaken, and from experience from referrals through both procedures we will learn much. The Supreme Court will need to develop techniques for determining the most appropriate cases for referral because the referral by the Supreme Court must be tantamount to a decision that the Supreme Court itself is not going to take the case up for review. If the Supreme Court should undertake to review decisions of the Inter-Circuit Panel--in any but the rarest of circumstances--the panel will fail to achieve its purposes.

I have only one suggestion for a small modification in one provision of the bill, namely, that the panel be authorized to function for seven years instead of five. I believe that the longer period is necessary in order to provide an adequate basis for evaluating the worth and effectiveness of this device. The first year of the panel's existence will be a start-up time during which procedures will be developed. A comprehensive report on the panel's work must be submitted to Congress at least one year before the termination date of the panel. Thus, even with a seven-year life, only five fully operative years will be available for evaluation. This is the minimum period, I believe, that will enable Congress to form a sound judgment on the utility of this adjunct forum.

Behind this bill lie fourteen years of study, debate, and hearings in Congress. It was in 1971 that the idea of some type of additional appellate forum at the apex of the federal judiciary began to be seriously discussed. The idea has evolved through various configurations as a result of the national debate on the subject. Essentially, the concept has moved from that of a new, separate court (the so-called National Court of Appeals) to that of a panel composed of existing circuit judges serving as an auxiliary to the Supreme Court itself. This latter concept has been the focus of attention in the 1980s. Within the Senate Judiciary Committee two hearings have been held within the last three years, and a House Judiciary Subcommittee held extensive hearings on the idea during 1983.* As a result of these hearings and discussions in other forums, the idea has been refined, and the best thinking on the subject is now embodied in S. 704.

The time has now come to bring speculation to a close and to enact this measure. Within its limited life, the Inter-Circuit Panel is unlikely to work significant harm to the federal judicial system or to the rights of citizens. If it is not working or is working poorly, the Supreme Court can simply cease referring cases to it. In any event, the panel would terminate, by the terms of the bill, at the end of a fixed period. In the meantime, we would have an experiment that will go far toward answering the questions to which no one at the moment has definitive answers. If the Wright Brothers--or someone else--had never attempted to fly the first airplane we would never have learned whether man could fly a heavier-than-air craft. Experimentation is at the heart of advancement in technology and human institutions, including the courts. We must be willing to experiment to develop devices and techniques to tackle the deficiencies and malfunctions in the judicial system. The modest, yet potentially beneficial, experiment of the Inter-Circuit Panel should be launched without further disputation over whether it will indeed do what it is designed to do. The country is entitled to find this out by putting it in place for a period of years.

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* Hearing before the Subcommittee on Courts of the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess., on Establishment of a National Court of Appeals, Sept. 24, 1982; Hearings before the Subcommittee on Courts of the Committee on the Judiciary, United States Senate, 98th Cong., 1st Sess., on S. 645, March 11, April 8, 1983; Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 98th Cong., 1st Sess., on H.R. 1968 (Supreme Court Workload), April 27, May 18, September 22, November 10, 1983.

Senator EAST. Thank you, Professor Meador. Senator Heflin?

Senator HEFLIN. Thank you, gentlemen.

Senator Hruska, I am trying to recall, in your efforts with the "National Court of Appeals," there was a study that was made, either by the Judiciary Committee or your Commission, concerning conflicts, in which each of the—1 year, each of the court of appeals was studied as to the number of conflicts that existed. As far as I know that is the only study of that nature, that has ever been done.

Was that Fennel? I am just trying to remember what that report was called, and would you give us some informaticn on that.

Maybe Mr. Levin would know something about that, too.

Mr. HRUSKA. Mr. Levin, who acted as our executive director, has opened a yellow-covered book. He is opening it to the pages that treat that report and the discussion on that subject.

May I refer the question to him, now.

Mr. LEVIN. Let me just say that, without rehearsing the data, Senator Heflin, it appears at page 91 of the published report of the Hruska Commission as "Conflicts in the Supreme Court: A Study of Petitions for certiorari." It was done by Professor Floyd Feeney.

Senator HEFLIN. Feeney. Yes.

Mr. LEVIN. It demonstrated——

Senator HEFLIN. It showed that year that there were—in 1973, was it not, or was it 1974, that there were over a hundred——

Mr. LEVIN. Well, let me just say that he broke it down into a lot of categories.

I would prefer to be very careful with the numbers, partly because of the definition of conflict. For example, there is one part of the literature, unrelated to the intercircuit panel, that has a distinguished lawyer arguing that where a tax statute has two separate subsections with the identical language, if one court has decided the meaning of that subsection where it is part of section 3, and another court is going the opposite way where it was part of section 5, that is no conflict at all.

And so there is a lot of discussion here of what is a "side-swipe" versus what is a direct conflict. To me, even beyond the figures—which were impressive to the Senator and his fellow commissioners—is the statement of Justice White looking at the very last term of court, in which he says that the bulk of the 54 cases with publicly noted dissents involved "conflicts or confusion among the lower courts." By my count, the Court has turned aside 33 such cases. Twenty-nine of these—23 statutory and 6 constitutional cases—involved flat conflicts between the lower courts on a specific statutory or constitutional issue. That included 23 statutory cases involving absolutely a "flat conflicts" in 1 year that were turned down by the Court.

And of course there were a number that were taken. There is enough volume, particularly under this particular proposal, to justify the bill. Moreover, the panel would never sit unless it had business.

Professor MEADOR. Mr. Chairman, I wonder if I could add a piece of information to that. Excuse me, Senator Heflin.

Senator HEFLIN. Go ahead.

Professor **Meador**. Judge John Godbold, chief judge of the eleventh circuit, testified in a House Judiciary subcommittee hearing in 1983 about conflicts in the eleventh circuit. He had had a study made of the court's docket for the year 1982, using a sampling technique from which they extrapolated data showing that during 1982 the eleventh circuit decided cases that generated approximately 36 new intercircuit conflicts and continued existing conflicts in about another 50 cases. That is just 1 circuit in 1 year, and there are 12 other circuits.

Senator **Heflin**. You are probably talking about several thousand cases that are out there, and they exist because of the failure of the courts to be able to address them.

Senator **East**. Is that all you had, Senator?

Senator **Heflin**. Yes.

Senator **East**. I think to expedite matters, I will thank you, gentlemen, very much for coming and making your valuable contributions.

We have one final witness.

Mr. **Hruska**. Thank you, Mr. Chairman.

Senator **East**. Thank you, gentlemen. Senator Hruska, it was a pleasure to see you again. Our final witness is Prof. John Sexton, professor of law at New York University. Professor Sexton also served as law clerk to Chief Justice Warren Burger. Professor, we appreciate your coming this morning.

STATEMENT OF PROF. JOHN SEXTON, PROFESSOR OF LAW, NEW YORK UNIVERSITY

Dr. **Sexton**. Thank you, Mr. Chairman, Senator Heflin, I am very honored to be here.

I am here today on behalf of myself, my colleague and coauthor, Prof. Samuel Estreicher, and the editors of the New York University Law Review who worked on the NYU Supreme Court project with us. The project covers over 1,200 pages in the law review and is contained in the April, May, and June 1984 issues of that magazine.

I am submitting a full statement for the record, which I would appreciate the committee publishing.

I will keep my remarks to the 10-minute limit and then be open for questions.

We oppose Senate bill 704, and we view, skeptically, proposals to create an intercircuit tribunal, or ICT. The case for such a tribunal, in our view, has not been made; indeed, ICT proponents have failed to address, let alone establish, the major premise of their position—that is, that presently the Supreme Court has insufficient capacity to decide all of the cases it should decide. Our own work, a 2-year study of the Court's docket, convinces us to the contrary, that the Court has ample capacity to decide the cases that must be decided in a given year. Moreover, our work suggests that, to the extent a workload problem exists at the Court, the Court could improve the situation substantially by making some relatively minor adjustments in its procedures. Finally, our study convinces us that creating an ICT would exacerbate, rather than ameliorate, whatever workload problem exists.

Together with the students of the New York University Law Review, we studied the Court's docket for the 1982 term, a full term of cases, in order to test the assumption that the Court does not have the capacity to decide all of the cases that it should decide.

We developed elaborate, nonpolitical, specific criteria for case selection, based on a view of the Court as manager of our national judicial system.

Then using those criteria, we examined the approximately 165 cases that the Court agreed to hear that year, and the nearly 2,000 cases on the "paid docket," which the Court refused to hear that term.

The 1982 term was selected because in that term, the Court's workload problem allegedly reached its zenith—the number of cases filed has been falling off slightly since then—with several of the Justices publicly complaining about the workload that year.

Applying the criteria developed in our project, we draw several conclusions that seem to undermine the basic premise of the ICT proposal.

First, nearly one-fourth, 39 out of 165 of the cases granted review by the Supreme Court in the 1982 term, had, in our view, no legitimate claim on the Court's time and resources.

Second, only about half of the cases granted review in the 1982 term required review by the Court that year.

Third, the remaining cases granted review in the 1982 term merited review only if the Justices had excess time and energy to spend on them, after hearing the cases that required the Court's attention.

And, finally, fourth. Less than 1 percent, precisely 12 out of the 2,000 cases denied review by the Court in the 1982 term, fell into the category of cases that the Justices should have heard that year.

Therefore, while the Court reviewed 165 cases in 1982, it had to review only 91. In short, we did not find a workload problem warranting the creation of a new court; indeed, we found that by fine tuning its case selection process, the Court could produce significant additional capacity to year and decide cases.

We view our study not as ending the debate over how the Supreme Court should use its time and energy, but as beginning it. We recognize that the results of the study are based upon our vision of what the Court should be doing, and though we believe our vision will enjoy widespread support, and have tried to build it on widely shared premises, we acknowledge that other visions are possible.

What we do feel strongly, however, is that it is not reasonable to assert the existence of a workload crisis without articulating a specific vision of what the Court should be doing. And the proponents of the ICT have not done that, preferring instead simply to assert the existence of a crisis. Our study challenges that assertion.

Quite independent of the numbers I have just reported, our study persuaded us that there are several reasons why an ICT will exacerbate whatever workload problem exists.

I will list just a few, some of which have not been mentioned by other speakers this morning.

No. 1. An ICT would increase the Court's screening burden. The current proposal would have the Supreme Court review each petition to determine whether it should be referred to the new Court. Because creation of an ICT would be viewed as improving the odds of obtaining review beyond the circuit courts, the opportunity for additional review will create demand for additional review. More cases will be filed with the Supreme Court, and the Justices would have to do more screening.

Moreover, an ICT, as was noted earlier, would make each screening decision—on each of the cases filed because of the ITC, and on the 5,000 the Court is now doing—more complicated. The Justices would have to determine not only whether a case warranted review, but whether it should be reviewed, or referred to the Court, or denied review.

No. 2. An ICT would contribute to instability and incoherence. Adding another round of review above the present courts of appeals would encourage additional appeals and thereby devalue their rulings and destabilize the law made by those courts. In the process, the very incoherence that the ICT attempts to address would be accentuated.

No. 3. The Supreme Court would be forced to invest energy in monitoring the decisions of the ICT. This is an important point that has not been made. If an ICT were established, the Supreme Court would have the added burden of carefully screening the new court's decisions. If it ever were established on a long-term basis, there would certainly be times when the ICT would be at ideological loggerheads with the Supreme Court, as certain of the circuit courts have been. This point does not apply of course to the ICT envisoned by Senate bill 704 since that bill would establish only a temporary panel. But for that very reason, the experimentation with an ICT envisioned in Senate bill 704, would be experimentation without a key ingredient.

No. 4. The ICT would contribute to instability and incoherence because its membership would be unstable. The proposed ICT draws its judges on a rotating basis from those now sitting on the courts. Were this continued on a long-term basis, the practice of rotating judges could produce major doctrinal shifts, as one-third of the judges are replaced each year.

On the other hand—and this is the final segment of my remarks—we believe that a few modest reforms would permit a sounder use of the Court's scarce decisional resources while avoiding unnecessary structural alteration of the Federal judiciary. Most of the reforms we propose could be effected by the Justices themselves. One would require congressional action.

We recommend, No. 1, Congress should abolish the mandatory appellate jurisdiction of the Court. There is almost universal agreement on that.

No. 2. The Court should formulate and publicize specific meaningful criteria for case selection. Rule 17 just does not do it. And frankly, as a person who clerked at the Court, the clerks, who are the people who are the front line of defense in screening the petitions, get no guidance. There is a common law that develops among the clerks, but there is no systematic criteria that have been developed for screening petitions. The lack of meaningful criteria contributes to overgranting and overpetitioning, because litigants cannot tell whether their cases merit review, and they are willing to take a chance. Although our criteria are not the final word, our proposed model indicates the kind of inquiry the Justices ought to pursue in the effort to formulate and publicize coherent workable guidelines for managing the Supreme Court's docket.

No 3. The Court should require petitioners to link their requests to the enunciated selection criteria. This could be done with a cover sheet requiring the attorney to present a distilled version of his argument for review in terms of the relevant criteria.

No. 4. The Court should require a responsible party to certify that the case merits Supreme Court review, much as we require under rule 11 of the Federal Rules of Civil Procedure that lawyers certify complaints and discovery requests. And there should be sanctions for frivolous petitions.

No. 5. The Court should establish a "second look" mechanism. This is extremely important, because just a glance at U.S. Law Week, or the Supreme Court Reporter, will reveal that each year, the Court itself dismisses a half a dozen cases as improvidently granted. We propose that the Justices, at the initial conference, should vote on each petition to grant or deny review as they do now. However, those results obtained at the Friday conference should not be announced on Monday, as they are now. Instead, the petitions that receive at least four votes should be submitted to an independent staff of the caliber of the Justices' law clerks. The staff would use the criteria for case selection to produce a memo on whether the case merited review and whether there were any procedural defects. Then the petitions accompanied with the staff reports would be returned to the Justices for a second vote, and only after that second vote, would the case be granted.

And finally, No. 6. The Court should conduct less frequent conferences on petitions. This is a very simple idea but it would have a significant effect, we think. The Justices presently vote on request for review as part of their weekly conference on Friday. This procedure often provides them with a fragmentary and unrepresentative view of the annual docket. We suggest that if the Justices reviewed petitions on a monthly or bimonthly, rather than on a weekly basis, they would gain a more accurate overview of the developing docket.

We also endorse the suggestion of Judges Feinberg and Friendly, that petitions be screened by panels of three of the Justices, with only one vote necessary to bring a petition before all nine Justices for review.

In conclusion, we certainly do not claim that our view of the Court's role is the only possible one, but we do claim that the debate over proposals for an ICT has suffered mightily, from a failure to address the fundamental question of the Court's role in our society.

At least on the view of the Court we advance, the major justifications offered for such a Court appear to be ill-founded.

Thank you. I stand ready for questions.

[Submissions for the record follow:]

PREPARED STATEMENT OF SAMUEL ESTREICHER AND JOHN SEXTON OF NEW YORK UNIVERSITY LAW SCHOOL

We oppose Senate Bill 704 and view skeptically proposals to create an Intercircuit Tribunal or ICT. The case for such a tribunal has not been made. Indeed, ICT proponents have failed to address, let alone to establish, the major premise of their position -- that is, that presently the Supreme Court has insufficient capacity to decide all of the cases it should be deciding. Our own work -- a two year study of the Court's docket -- convinces us to the contrary, that the Court has ample capacity to decide the cases that must be decided in a given year. Moreover, our work suggests that, to the extent a workload problem exists, the Court could improve the situation substantially by making some relatively minor adjustments in its procedures. Finally, our study suggests that creating a new Intercircuit Tribunal would exacerbate, rather than ameliorate, whatever workload problem there is.

I. THE NYU STUDY OF THE 1982 TERM

Given the extraordinary increase in the number of filings in the Supreme Court, it is assumed that the Court faces a workload crisis. However, this "common sense" assumption, which prompts the call for an Intercircuit Tribunal, is not self-evident -- and is perhaps unwarranted. Even a dramatic increase in the number of filings in the Supreme Court does not, by itself, indicate that the Court is being taxed beyond its capacity. Without study, it is impossible to know whether the Court's ability to function effectively has been compromised by the greater number of filings.

Together with the students of the New York University Law Review, we have completed a detailed study of the Supreme Court's docket in a recent term (the 1982 Term) in order to test the assumption that the Supreme Court does not have the capacity to decide all of the cases that it should decide. After developing non-political, specific criteria for case selection, we examined the approximately 165 cases (treating petitions from the same lower court ruling as one case) that the Court agreed to hear and the nearly 2,000 cases (on the "paid" docket) which the Court refused to hear in the 1982 Term. The 1982 Term was selected because in that Term the Court's workload problem allegedly reached its zenith, with several of the Justices publicly complaining about it.

Applying the criteria developed in our Project, we draw several conclusions that seem to undermine the basic premise of the ICT proposal:

> (1) Nearly one-fourth (39 of 165) of the cases granted review by the Supreme Court in the 1982 Term had no legitimate claim on the Court's time and resources.
>
> (2) Only 48% (79 of 165) of the cases granted review in the 1982 Term required review by the Court that year.
>
> (3) The remaining 28% (47 of 165) of the cases granted review in the 1982 Term merited review only if the Justices had excess time and energy to spend on them after hearing the cases that required Supreme Court review.
>
> (4) Only 0.65% (12 of 1,860) of the cases denied review by the Court in the 1982 Term fell into the category of cases the Justices had to have heard. Moreover, of the 12 cases presenting conflicts, only 4 truly required immediate Supreme Court resolution.

Therefore, while the Court reviewed 165 cases in 1982, it need only have heard 91 cases. Far from a workload problem warranting the creation of a new national court, the Court may well find, after reform of its case selection process, significant additional capacity to hear and decide cases.

We view our study not as ending the debate over how the Supreme Court should use its time and energy, but as beginning it. We recognize that the results of the study are based upon our vision of what the Court should be doing and, though we believe our vision will enjoy widespread support, we acknowledge that other visions (and hence other results) are possible. What we do feel strongly, however, is that it is not reasonable to assert the existence of a workload crisis without articulating a vision of what the Court's work should be. The proponents of an ICT have not done that, preferring instead simply to assert the existence of a crisis. Our study challenges that assumption.

A. The Supreme Court as Manager

We turn now to our view of the Court's role. The problem, in our view, is not the Court's docket, but the unrealistic expectations that many in our society have for the Court. It is admittedly comforting to believe that the Supreme Court is the ultimate check on error in our legal system, available to ensure that justice is done in every case governed by federal law. But, given the volume of litigation in our society today, the Supreme Court cannot act -- and, for several decades, has not acted -- as the "court of last resort" in every case. All commentators pay "lip service" to the view that the Supreme Court no longer sits merely as a "court of error;" nonetheless, we all share a reluctance to concede that the Court is not available to rectify wrong in cases about which we care intensely. The problem is that this vision of the Court as an "error corrector" breeds frustration among those who are denied access to the Court despite their perception that error requiring review exists in their case; and perpetuating the illusory vision that the Court is potentially available to right the wrong only serves to foster the belief that the Court needs more capacity.

The criteria for case selection set forth in Supreme

Court Rule 17 are in large part responsible for the problem. The Rule offers no clear guidelines. This not only perpetuates the myth of the Court as error-corrector; it also pushes the Court to agree to hear cases it should not hear. Because there are no clear guidelines delineating the kinds of cases the Court should or may hear, the Justices, each acting individually, are encouraged to vote for review based on subjective factors. When the individual agendas of the Justices are allowed such free rein, the result is that the Court agrees to hear cases that do not merit its time. The Justices inadvertently make unnecessary work for themselves. Litigants know this, and frequently file for review in the hope that their case will strike the Justices' fancy.

Our study, by contrast to Rule 17, is based on a distinct and articulated vision of the Supreme Court's role in our society. In our view, the Court should act as the manager of the judicial system, overseeing the work of the federal and state courts, and intervening only when necessary to resolve fundamental interbranch or federal-state clashes or to render a final resolution of a question that has ripened for decision after percolation among the lower courts. There are cases in which the Court must intervene when the issue first arises. President Nixon's claim of executive privilege during the Watergate crisis required the immediate attention of the Supreme Court, as did the constitutional validity of President Carter's plan for resolving the Iranian assets litigation. But such cases are relatively rare. The overwhelming majority of cases on the Court's docket raise issues that, while of undoubted importance to certain sectors of society, need not be heard in any given year. The Court as manager should leave such cases to the lower federal and state courts, intervening only after completion of the process of lower-court consideration.

We propose a model of the Court's responsibilities that embodies traditional premises of the legal system, makes affirmative use of the existing infrastracture of federal and state courts, and ensures a manageable agenda for the Court irrespective of any expansion of the body of federal law or any surge in the number of petitions filed for review. Our model accepts the fact that the Court can no longer act to ensure that justice is done in the particular case; rather, the Court's responsibility is to manage effectively a system every layer of which is dedicated to the goal of justice.

The Court must use lower federal and state courts effectively. It can, and should, establish and police a framework for the delegation of responsibility to lower courts. Except in special situations justifying immediate intervention, the Court as manager should accord a presumption of regularity and validity to the decisions of state and lower federal courts. A wise manager delegates responsibilities to subordinates and, absent an indication that something is awry, accords their decisions a presumption of regularity. The Court should intervene only when it has reason to doubt that presumption of regularity -- say, because the circuits are hopelessly deadlocked in conflict; or a particular court has displayed an unwillingness to heed Supreme Court precedent; or a profound clash between the branches, or between the state and federal governments, requires immediate resolution; or changes in the development of federal law are indicated that only the Court can set in motion.

We have, of course, considered the view that an important responsibility of the Court is to ensure the uniformity of federal law. We do not believe, however, that the Court must act to eradicate disuniformity as soon as it appears. Important features of our legal system suggest that uniformity is not always desired. From the absence of a rule of intercircuit stare decisis -- in our system, the circuits are free to disagree with one another -- and the presence of federal and state courts free to disagree with one another though operating in the same geographic jurisdiction, we derive a basic premise that disuniformity, at least in the short run, may be tolerable and perhaps beneficial. Disagreement in the lower courts facilitates the independent evaluation of a legal issue by different courts. The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court finalizes the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, thus has the benefit of the experience of those lower courts.

The Court's authority and responsibility flow from its unique position as the only institution in our society capable of an authoritative, final judicial resolution of a controversy governed by federal law. In constitutional law, the finality of the Court's decisions is virtually unshakable (despite occasional overruling of precedent). Even the Court's rulings on statutory and common law questions enjoy practical finality, given the strong policy of stare decisis accorded to such resolutions and the hurdles that lie in the path of legislative action in our system. As Justice Jackson noted in his famous epigram: "We are not final because we are infallible, but we are infallible only because we are final." The Court, however, cannot and should not seek to arrest the law's development at each available opportunity. Under our managerial conception of the Court's responsibilities, we submit, the Court has ample resources to accomplish all that must be done in a given year, and more. Without it, or some other attempt at a principled definition of the Court's role, the Court is doomed to bear a "workload problem" -- no matter how many new courts we create.

B. Analysis of the Cases for the 1982 Term

The Court granted review in 165 cases during the 1982 Term. In our study, we called the cases that, on our criteria, the Court *had* to hear that year the "priority" caes; we called those that it might properly choose to hear if it had extra capacity the "discretionary" cases; and we called those that had no proper claim on the Court's time the "improvident" cases. Applying our criteria to the 165 cases heard in the 1982 Term, we discovered that 48% (seventy-nine) were on the priority docket, 28% (forty-seven) were on the discretionary docket, and 24% (thirty-nine) were improvident grants.

Of the seventy-eight cases on the priority docket, 73% (fifty-seven) involved intercourt conflicts. Only nine cases involved federal decisions invalidating state statutes, and seven cases involved federal decisions invalidating federal statutes. Five cases -- 6% of the priority docket -- presented direct conflicts with Supreme Court precedent.

The high proportion of conflict cases on the Court's docket -- 42% of the cases the Court heard during the Term -- demonstrates that the Court takes seriously its conflict-resolution responsibility. Of the fifty-seven conflict cases on the priority docket, fifty-two presented conflicts involving three or more courts. Of the five that presented two-court conflicts, four were in the tax, labor, and civil rights areas, and were placed on the priority docket because of their significant potential for forum shopping or impact on planning by multi-circuit actors.

Out of 165 cases, there were thirty-nine improvident grants, or 24% of the total. If one looks only at the cases receiving plenary review, there were thirty-two improvident grants, or 22% of the total. And if one excludes all cases that the Court would most likely not have heard were its obligatory jurisdiction abolished, there were thirty-two improvident grants, or 20% of the total. However the data are analyzed, *nearly one out of every four or five cases that the Court agreed to hear should not have been reviewed under the criteria of our study*.

An analysis of the thirty-nine improvident grants by subject matter reveals that twenty-three involved civil claims and sixteen involved criminal prosecutions (including habeas review); a disproportionate number of improvident grants arose out of criminal prosecutions or federal habeas review.

The editors of the *New York University Law Review* examined all of the paid cases denied review during the 1982 Term: 1860 petitions and jurisdictional statements in all. The *Review* examined the denied cases for unresolved intercourt conflicts and conflicts with Supreme Court precedent. The *Review* did not, however, examine the denied cases for any of the other priority docket categories, because the other priority cases generally would arise as obligatory appeals. Unlike a denial of certiorari, the dismissal of an appeal has precedential value and therefore, arguably, the Court gives closer scrutiny to appeals. With this exception, then, the *Review* directly investigated whether the Court's workload prevented it from hearing cases triggering the Court's mandatory responsibilities.

Out of 1860 petitions examined, the *Review* found thirteen petitions presenting twelve intolerable conflicts that should have been heard under the criteria of the study. The *Review* determined, however, that seven of these petitions were properly denied review for other reasons. Therefore, according to the *Review*'s findings, *only four petitions were improperly denied review*. All but one of the thirteen petitions involved three-court conflicts. In addition, the *Review* found seven petitions raising two-court conflicts that did not present any significant potential for forum shopping or burden on multi-circuit actors.

Thus the Review found nineteen intercourt conflicts comprising 1.02% of the cases denied review, that the Court failed to resolve during the 1982 Term. These findings are strikingly consistent with those of earlier studies, including the work of Dean Gerhard Casper and Professor (now Judge) Richard Posner (who found that only 1.3% of the cases studied during the 1971-73 Terms presented conflicts that the Court declined to review), and reconcilable with the work commissioned by the Hruska Commission.

Because at most twelve intolerable, unresolved conflicts were denied review during the 1982 Term -- a mere one-third of the thirty-nine improvident grants of the 1982 Term -- we may safely conclude that the Court had the capacity to reach the improper denials. At the very least, these numbers undermine the claim that docket incapacity prevents the Court from resolving conflicts among the circuits.

II. The ICT Is an Unsuitable Remedy

A. An ICT would Increase the Court's Screening Burden. Creation of an ICT would be viewed as improving the odds of obtaining review beyond the circuit courts of appeals. The Supreme Court must review each of these new petitions, of course. So, the Court's screening burden -- measured in the number of cases screened -- is likely to be increased by creation of an ICT.

Moreover, an ICT would make every screening decision more complicated. The Justices would have to determine not only whether a case warranted review but also whether they should retain it for themselves or refer it to the ICT.

B. An ICT would Contribute to Instability and Incoherence. Adding another round of review above the present courts of appeals would devalue their rulings. This devaluation would reflect not only a perception of the change in status of the courts of appeals in the judicial hierarchy, but also objective reality, because the odds in favor of obtaining review of a circuit court decision would be dramatically increased. This would diminish the relative weight accorded their opinions (as well as the circuit judges' own sense of responsibility for resolving both inter-circuit and intra-circuit conflicts), destabilizing the law by encouraging additional appeals, and in the process exacerbating the doctrinal incoherence that the new court was intended to clear up.

C. The Supreme Court Would Be Forced to Monitor and Review Decisions of the ICT. Because ICT decisions would bind the nation, the Supreme Court would be forced to examine the ICT's work closely. Indeed, Supreme Court review simply for purposes of error correction might well prove unavoidable in many cases. Even dicta in ICT rulings would acquire special significance, and would command the Court's attention during case selection. Thus, if an ICT were established, the Supreme Court would have the added burden of carefully screening the new court's decisions.

An ICT might produce still more problems. ICT advocates envision an ICT working easily with the Supreme Court and populated by judges compatible -- jurisprudentially and ideologically -- with the Justices of the Supreme Court. There would certainly be times, however, when the ICT would be at loggerheads with the Supreme Court. At such times, the Court would simply be making more work for itself by referring cases to the ICT. But if the Court declined to refer cases to the ICT because of incompatibility, it would sacrifice whatever advantages are thought to be associated with such a court.

This latter point does not apply to the ICT envisioned in Senate Bill 704, of course, since that bill would establish only a temporary panel. For that very reason, however, the "experimentation" with an ICT that Senate Bill 704 seeks to offer would be experimentation without the key ingredient.

D. Rotating Membership on the ICT Would Contribute to Instability and Incoherence. The ICT would draw its judges on a rotating basis from those now sitting on the courts of appeals. Were this continued on a long-term basis, the practice of rotating judges could produce major doctrinal shifts when judges are replaced. Students of Supreme Court history have noted that the appointment process is often the critical vehicle for remaking constitutional law. Under current arrangements, we have a gradual process that requires substantial maturation before the development of constitutional doctrine is significantly altered. The rotation of judges on the ICT, however, would dramatically accelerate such doctrinal shifts, possibly compromising the authoritative guidance ICT proponents claim their court would provide.

III. Tailoring the Remedy to the Problem

We believe that a few modest reforms would permit a sounder use of the Court's scarce decisional resources while avoiding unnecessary structural alteration of the federal judiciary -- thereby easing substantially whatever problem of docket overload may exist. Most of the reforms we propose could be effected by the Justices themselves; one or two would require congressional action. Each would enable the

Court to perform its managerial functions better and to fulfill its role as articulator of authoritative and uniform federal law.

A. Abolish Mandatory Appellate Jurisdiction. All the Justices and virtually all commentators endorse the proposal to abolish mandatory jurisdiction. The Court's mandatory appellate docket accounts for somewhere between 25% and 35% of the Court's caseload (21% in the 1982 Term). In our view, commentators have overstated the significance of abolition, inasmuch as most appeals would still be assigned to the priority docket. Nevertheless, an appreciable number of cases -- in our study, twelve of 165, or 7% of the overall docket -- would not merit the Court's attention if obligatory jurisdiction were abolished.

B. Formulate Specific Meaningful Criteria for Case Selection. We urge the Court to develop more specific criteria for selecting cases for review. The lack of meaningful criteria contributes to overgranting and overpetitioning, because litigants can never be certain whether their cases merit review. Although the criteria in our study are not the final word, our proposed model indicates the kind of inquiry the Justices ought to pursue in the effort to formulate coherent, workable guidelines for managing the Court's docket. In formulating these guidelines, the Court should solicit the views of the legal community. Once these criteria assume final shape, the Court should, perhaps by emulation of the Administrative Procedure Act's rulemaking procedures, disseminate them throughout the legal community.

C. Require Petitions to Link Requests for Review to the Court's Enunciated Certiorari Criteria. The rules governing petitions for certiorari should require petitioners to file a short supplemental statement -- possibly on a checklist form developed by the Court -- setting forth procedural information to facilitate the Court's evaluation of the certworthiness of each petition. This statement should indicate whether the petition is from a final judgment of the court below, and should explicitly link the petitioner's request for review to the Court's articulated criteria.

When the basis of the request for review is an alleged conflict among the circuits, the statement should provide three additional pieces of information. First, the petitioner should identify the precise issue on which a conflict is alleged. Second, the petitioner should cite at lease three, but no more than six, cases presenting the conflict. Third, the petitioner should aver that the alleged conflict was brought to the attention of the court below. This statement should require no more than a few marks on a checklist, coupled with a paragraph or two of case citations (for allegations of intercourt conflicts). Many petitions would not survive a prima facie checklist examination. For other petitions, the checklist would highlight the issues that demand the Court's attention. In many cases, the Court would no longer need to wade through prolix petitions and string cites; in all, litigants would be compelled to focus their arguments for Supreme Court review.

D. Require a Responsible Party to Certify that the Case Merits Supreme Court Review. We urge that the Supreme Court, on the model of Rule 11 of the Federal Rules of Civil Procedure, require certification that the petition for review is not frivolous. Costs or other sanctions should be imposed on attorneys who violate this procedure.

E. Establish a "Second Look" Mechanism. The Justices at the initial conference should vote on each petition to grant or deny review, as they do now. However, the results of that vote should not be announced. Instead, petitions that receive at least four votes should be submitted to an independent staff of the caliber of the Justices' clerks, headed by a leading senior member of the Supreme Court bar. The staff would use the criteria for case selection to determine whether the cases merited review. They would inquire whether there were any procedural obstacles to consideration of the merits, such as the absence of a final judgment, and evaluate the state of the record to determine whether the case provided a suitable vehicle for review. Then the petitions, accompanied by the staff reports, would be returned to the Justices for reconsideration and a final vote at a second conference. If the cases still received at least four votes, review would be granted and the result announced.

We urge that the screening process include another preliminary step when a petition is granted as a vehicle for announcing a major doctrinal shift or innovation. There is no point in a vehicle grant that will yield only a plurality opinion and a splintered court. Therefore, to better identify suitable vehicles, the Justices should take a straw vote or in some other way determine whether they will be able to unite on an opinion that authoritatively sets forth clear and easily applied rules and legal principles. Naturally, this straw vote would not (and should not) preclude a change of mind after briefs and arguments. But if the Justices' straw vote determines that there is no consensus on the structure or substance of an eventual Court opinion, then the Justices will have had advance notice that the case should not be granted on a vehicle rationale.

F. Provide for Less Frequent Conferences on Petitions

and for Initial Screening by Fewer Justices. The Justices presently vote on requests for review as part of their weekly conferrnce; this procedure often provides them with a fragmentary and unrepresentative view of the annual docket. We suggest that, if the Justices review petitions on a monthly or semi-monthly rather than weekly basis, they can gain a more accurate overview of the developing docket and the work of the lower courts. By locating each decision to grant or deny review in context, monthly or semi-monthly review would curb the tendencies stimulating the overgranting phenomenon.

We also endorse the suggestion of Judges Feinberg and Friendly that petitions be screened by panels of three Justices, with only one vote necessary to bring a petition before all nine Justices for review. This proposal would reduce substantially the screening burden; each Justice would consider only the one-third of all petitions handled by his or her panel and those cases referred to the full Court by the other two panels.

G. Facilitate Further Research Through Increased Data Collection. Data are indispensable if the legal community is to assist the Court in assessing its performance and to identify further reforms that could alleviate the Court's burden. The Court can help by publishing the Justices' vote on decisions to grant or deny review. Publication need not be simultaneous with the actual vote. The Court could open its records on votes to grant or deny review several years after the actual vote. Such information would be extraordinarily useful in discussion of proposals for reform. For example, it would provide a data base for assessing the operation of the Rule of Four, and for evaluating proposals for a Rule of Five. Similarly, publication of these votes would permit students of the Court to evaluate the contribution, if any, of the cert pool practice to the overgranting phenomenon.

H. Use Transfer and Venue Rules to Avoid Forum Shopping. The mere fact that two circuits are in conflict presents no pressing reason for Supreme Court intervention, unless a party can take advantage of the conflict by forum shopping or the conflict stymies the planning of multi-circuit actors. Much can be done, moreover, to minimize these undesirable features of conflicts while preserving the benefits of percolation and reducing significantly the number of conflict cases on the Supreme Court's priority docket.

The most promising approach, in our view, would be for Congress to restrict federal venue to the district or circuit where the claim or cause of action arose. Under a restrictive venue regime, parties would know with certainty the law that would govern their affairs. Moreover, they would be unable to bring themselves under a different set of legal rules by forum choice. We recognize that this approach raises difficult questions, such as the assignment of a situs to multi-district or multi-circuit transactions. Special rules might also be needed for cases involving challenges to government regulations or to decisions of national applicability; for example, venue could be restricted to the District of Columbia Circuit or to the principal place of business or the residence of the challenger. For actions originating at the district court level, provision for transfer of venue for reasons of litigation convenience would be necessary, but, by analogy to the rules governing transfer in federal diversity cases, the law of the transferor circuit would apply.

IV. Conclusion

Our study of the Supreme Court's 1982 Term hopes to illuminate, but will not end, the debate over the proper relationship of the Supreme Court to the state and lower federal courts in our judicial system, and the utility of proposals urging the creation of a new ICT. We certainly do not claim that our view of the Court's role is the only possible one. But we do claim that the debate over proposals for an ICT has suffered mightily from a failure to address the fundamental question of the Court's role, and that, at least on the view of the Court we advance, the major justifications offered for such a court have not been borne out.

The creation of a new national court will not add to the capacity of the Supreme Court to decide cases because there is no reason to believe that litigants will accept the proposed court's resolution of their controversy. Indeed, a new layer of national review may exacerbate the problem by undermining the finality of the rulings of the existing circuit courts and by placing increasing pressure on the Supreme Court to review the nonfinal judgments of a court that purportedly speaks for the nation.

In our view, the Court should act as the manager of the federal judicial system, overseeing the work of the federal and state courts, and intervening only when necessary to resolve fundamental interbranch or federal-state clashes or to render a final resolution of a question that has ripened for decision after percolation in the lower courts.

Cases in which the Court must intervene when an issue first arises are relatively rare; the overwhelming majority of cases on the Court's docket raise issues that, although of undoubted importance to certain sectors of society, need not be heard in any given year. The Court as manager should leave such cases to the lower federal and state courts, intervening only after completion of the process of lower-court consideration.

Once one moves from the model of the Supreme Court as error corrector to a vision of the Court as manager, it becomes clear that the Court has the capacity to perform its essential functions, and more. What is needed is not an additional layer of nonfinal appellate review, but conscious management of the court's docket and a managerial conception of the Court's responsibilities in the federal system.

The study which forms the basis of these remarks, the New York University Supreme Court Project, consists of over 1200 pages and is found in Volume 59 of the _New York University Law Review_, beginning at page 673.

NYU SUPREME COURT PROJECT
EXECUTIVE SUMMARY

A MANAGERIAL THEORY OF THE SUPREME COURT'S RESPONSIBILITIES: AN EMPIRICAL STUDY OF THE 1982 TERM

I. PROPOSALS FOR RECONSTITUTING THE FEDERAL JUDICIARY

By 1969, when Warren Burger succeeded Earl Warren as Chief Justice, some commentators had noted indications that the workload of the federal courts, and particularly that of the Supreme Court, was outstripping the courts' resources. Almost from the day he joined the Court, the Chief Justice has pressed for major changes in the structure of the federal court system. Two independent panels -- the Freund Study Group, appointed by the Chief Justice in 1971, and the Hruska Commission, created by Congress in 1972 -- have identified workload problems of major proportions and proposed the creation (in different forms) of a National Court of Appeals to be situated between the present Courts of Appeals and the Supreme Court. Over the years, a consensus has developed among the Justices, scholars, and the legal community that the Court faces a workload problem, and that relief is needed.

Chief Justice Burger, who for over a decade has spotlighted the growth in the Court's annual workload, now feels that "[w]e have reached the point where our systems of justice -- both state and federal -- may literally break down before the end of this century, notwithstanding the great increase in the number of judges and the large infusion of court administrators." Thus, in his 1983 Annual Report on the State of the Judiciary to the American Bar Association, he focused on the caseload of the Supreme Court and issued an urgent call for help -- a call that he has often repeated, most recently in his 1985 address to the American Bar Association. Statistics on filings are only part of the problem:

> [O]ver the last 30 years or more the content and complexity of the cases have changed drastically, and often there are few precedents to guide the courts in these new areas. These wholly new kinds of cases that are reaching the courts reflect changes in our increasingly complex society and changes in the relationships of government to individuals....
>
> The problems we now face have resulted from the growth of the country, changes in science and engineering, the increasing complexity of society, the increasing complexity of the structure of business and industry, the enlargement of rights of individuals, changes in the relationships of people to government, and underlying all this, the great and increasing litigiousness of our people who historically have a passion for "taking to the law."

Burger, Annual Report on the State of the Judiciary, 69 A.B.A. J. 442, 443 (1983). And, the Chief Justice saw nothing but more trouble ahead:

> If we project the experience of the past 14 years over the next 14 years, the Supreme Court may well have 7,000 to 9,000 filings annually. I leave it to you to say how many fully argued cases requiring full treatment and signed opinions that would

> reasonably call for. Does anyone think nine justices could cope with 9,000 filings?

Id. The Chief Justice opined that the problem has become so severe that it is time for him to suggest a specific plan of action:

> I advocate an interim step which would provide immediate relief and also provide a concrete experience and information on which decisions can be made. I propose that, without waiting for any further study, a special, but temporary panel of the new United States Court of Appeals for the Federal Circuit be created. This special temporary panel, which I now propose, could be added to that court for administrative purposes. It should have special and narrow jurisdiction to decide all intercircuit conflicts and a limited five-year existence....

Id. at 447. This new panel would consist of 26 designated judges from the current Courts of Appeals, two from each circuit. Each sitting panel (of seven or nine judges) would sit for six months to one year, hearing and deciding cases posing inter-circuit conflicts "and possibly, in addition, a defined category of statutory interpretation cases." This experimental panel could, in the estimate of the Chief Justice, "take as many as 35 to 50 cases a year from the argument calendar of the Supreme Court," thereby enabling the Court to reduce its calendar to one hundred cases per Term. The Chief Justice would permit the Supreme Court to retain certiorari jurisdiction over cases heard by the Intercircuit Tribunal, but he expressed confidence that the Court would not need to review cases decided by the experimental panel very often, if at all.

An effort in Congress to create an Intercircuit Tribunal similar to that proposed by the Chief Justice began soon after his 1983 address. H.R. 1970, introduced in the House in March of 1983 by Representative Robert Kastenmeier (D. Cal.) and eighteen co-sponsors, would establish an Intercircuit Tribunal of the United States Courts of Appeals. The new court would consist of twenty-six judges, either active or senior, drawn from the current Circuit Courts of Appeals. It would sit in sitting panels of seven judges, provided that no two judges from the same circuit be designated to sit on the same panel. The judge who is senior in years of service of all the judges designated to sit on the new court would become the court's Chief Judge; the senior judge on each panel would become that panel's Chief Judge. The new court would hear cases referred to it by the Supreme Court. It would be able to deny review of cases coming from the circuit courts unless specifically directed by the Supreme Court to hear the case in question. Its decisions would be binding on all courts of the United States and, "with respect to questions arising under the Constitution, laws, or treaties of the United States, on all other courts." The new court would exist for five years.

The Senate version, S. 645, introduced in March of 1983 by Senators

Robert Dole (R. Kan.), Howell Heflin (D. Ala.), and Strom Thurmond (R. S.C.), also would create an Intercircuit Tribunal of the United States Courts of Appeals. This new court would consist of the Chancellor of the United States (a sitting Court of Appeals judge appointed by the Chief Justice and subject to removal by the Chief Justice, although upon removal the Chancellor would merely return to his or her original circuit) and twenty-six circuit judges, either senior judges or judges in regular active service. The judicial council of each circuit would designate two judges to serve on the new court for a period of five years. The new court would sit in panels of five judges. The Chancellor would preside over the entire court; the senior judge on each panel would preside over that panel. The President would appoint a new judge to replace the Chancellor on the circuit from which he or she was drawn; if the Chancellor chose to return to that circuit or was dismissed from the position of Chancellor, the circuit would be permitted to keep that added judgeship until one of its members leaves the circuit by assuming senior status, by retirement, or by death. In all other respects, the House and Senate versions of the Intercircuit Tribunal of the United States Courts of Appeals are identical.

Proponents of a National Court of Appeals or an Intercircuit Tribunal (hereinafter "NCA") typically employ one or all of three arguments to justify the creation of the new appellate court. The most basic argument is that the Supreme Court is so overworked (a proposition most frequently supported by citing the ever-growing number of filings of petitions for certiorari with the Court each Term) -- that it cannot adequately perform its functions. Since much of the Supreme Court's docket is discretionary, the Court's workload actually consists of two types of decision-making: screening the applications for review and deciding the cases accepted for review (normally by opinion after oral argument). The number of applications for review is beyond the Court's control and that number, as we have seen, has increased sharply over the years. The number of cases accepted for review is within the Court's control, and that number has increased somewhat in recent years (though not as sharply as the number of number of applications for review). Viewed in light of the two components of the Court's docket, the basic overload argument may be more precisely stated in the following terms: the Supreme Court does not have sufficient capacity to perform its screening function and decide all of the cases it should decide without compromising its performance of either or both tasks.

Of course, the Court might respond to the problem of overload not by compromising its performance in individual cases, but by reducing the number of cases accepted for review -- in other words, by refusing to decide cases that it should decide. Thus, proponents of a National Court of Appeals or Intercircuit Tribunal often advance one or both of two additional arguments which complement the basic argument that the Supreme Court has insufficient capacity to provide timely and authoritative adjudication on matters of national law: First, the Court is unable to resolve all of the conflicts among decisions of the various Circuit Courts of Appeals which it should resolve and which, under the present system, only it can resolve (what we call the "unresolved conflicts claim"). Second, even in the absence of intercourt conflict, there are many areas of federal law crying out for authoritative rulings which the Supreme Court is unable to render (what we call the "incoherence claim").

The existence of a workload too heavy for the good of the Court and the health of our legal system is usually inferred from statistics showing the steep increase in the number of applications for review. Although the increase in the number of filings cannot be denied, NCA proponents often infer too hastily from the increase in the number of filings in the Court the conclusion that the Court cannot handle its workload. Without further study, it cannot be said that an increase -- even a dramatic increase -- in the number of filings in the Supreme Court means that the Court is being taxed beyond its capacity. Perhaps in previous years the Court was not using its full capacity -- or, alternatively, perhaps it was using its full capacity, but was hearing cases it did not have to hear. Perhaps today's Court is more efficient -- or has more assistance and resources -- than in earlier times. Perhaps many of the filings that account for the increase are so frivolous as to demand little additional time. The point is that, without further study, it is impossible to know whether the Court's ability to perform its function effectively has been compromised by the increased number of filings. Few scholars have attempted to test the assumption that the Court's workload has grown to the point where the Justices cannot perform adequately all of the tasks required for the proper functioning of our legal order. The debate has dwelled on the details and efficacy (in addressing the workload problem) of the structural changes contained in the proposals, with proponents of reform assuming *ex hypothesi* that a problem exists and with critics of the proposals either tolerating that assumption or asserting that there is no crisis. The major premise of the debate has gone largely untested.

II. THE NYU SUPREME COURT PROJECT

The NYU Supreme Court Project is designed to evaluate the empirical premises underlying the debate over the Court's putative workload problem. The article by Professors Estreicher and Sexton provides an articulation of the Court's responsibilities, a set of criteria for evaluating case selection, and an application of such criteria in a way that allows the reader to examine the data. The study advances a vision of the Supreme Court's role, and a set of criteria consistent with that vision to guide the Court in selecting cases for review. Our goal is not to present the definitive view of the Court's role in our society, rather, we hope to spark debate over the Court's appropriate role and over the implications of various conceptions of that role for claims that the Court's workload is so unmanageable as to require the creation of a new appellate court. At a minimum, we hope to encourage a more reflective case selection process.

Having advanced the criteria that we believe should govern case selection, we offer a verifiable application of these criteria to the cases that the Court agreed to hear during the 1982 Term. We identify three types of cases: first, cases that the Court ought to hear (the "priority docket"); second, cases that the Court may appropriately hear (the "discretionary docket"); and, third, cases that are not worthy of review under our criteria (the "improvident docket"). In categorizing the cases, we recognize that controversy over our selections is unavoidable, but we hope that most thoughtful students of the Court will agree with our judgment on most of the cases.

This study examines all of the cases that the Supreme Court agreed to hear (165) and all of the "paid" cases that the Court refused to hear (1,860) during the 1982 Term. We chose for study the cases the Court agreed to hear during the 1982 Term rather than the cases it actually heard that Term because we wanted to replicate as nearly as possible the case selection process undertaken by the Court. Although our study is limited to one year, we believe that the 1982 Term is likely to give us an accurate picture of the extent of the Court's workload problem. Since several Justices during this Term expressed concern about the workload problem, it may be reasonably assumed that the Justices were sensitive to the size of the workload and were especially vigilant in selecting the cases they agreed to hear. Moreover, during the study period, the number of cases the Court agreed to hear with oral argument dropped sharply below the number heard in the previous Term, suggesting that the Justices were attempting to be more parsimonious in allocating their resources. In short, we chose the 1982 Term because, if the increased workload of the Court is forcing the Court to decline to review cases that it should hear, that problem should be especially acute in a year when the Court has granted relatively few cases. On the other hand, if it is discovered that even in the 1982 Term the Court improvidently granted review in a significant number of cases, then it would be fair to assume that in other Terms (when the Justices were less sensitive to docket capacity considerations) we should find an even greater percentage of improvident grants.

We recognize the hazards of a study limited to a single term. Aside from the inability to predict future trends, we may well have chosen a year that is atypical for reasons that were not anticipated. In any event, we hope that this study provides a research design for others, and we invite efforts at verification by scholars who would apply our criteria (or other criteria) to the certiorari docket of other Terms.

We examined the 165 granted cases ourselves and present a detailed analysis of each of them either in Part IV of our main Article and in Appendix A thereto. After lengthy discussions with us about the nature of the criteria, Law Review editors (as well as four research assistants to Professors Estreicher and Sexton) examined the 1,860 cases denied review with the object of determining whether any presented a conflict with Supreme Court precedent or an intercourt conflict. A detailed analysis of each of the cases denied review is presented in an appendix to the Notes. Cases that have the strongest claims to a place on the priority docket, that present insights into the workload problem, or that otherwise are of interest are isolated and discussed in the Notes. In our evaluation of the granted cases, we did not examine the actual opinions eventually issued by the Supreme Court. In short, we attempted, as far as possible, to assess the case ex ante -- as the Justices are forced to do. In addition to the study of the cases, five Law Review members chose Note topics related to the Project: (1) a reexamination of the cases presenting intercircuit conflicts that formed the basis for Professor Feeney's report to the Hruska Commission; (2) a study of four years of interaction between the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit, a court which in important ways would be analogous to the proposed new appellate court; (3) a study of the use of choice-of-law doctrine and venue and transfer rules to reduce the potential for forum shopping under federal statutes; (4) an examination of the proper criteria for granting cases that present a conflict with Supreme Court precedent; and (5) an examination of the proper criteria for granting death penalty cases.

This Project addresses most directly two of the allegations advanced in support of reform. The first allegation -- that the Court is "overloaded" in the sense that it is compelled to hear a number of cases that exceeds its capacity for quality decisionmaking -- assumes that every case granted review in fact merits Supreme Court consideration. Of course, the cases are not interchangeable, and we are alert to the possibility that not all cases present the same claim on the Court's resources. There also may be other factors, such as the sheer weight of the screening burden, that bear on the Court's ability to render quality decisions that are not addressed in this study. Nevertheless, we think it would advance evaluation of the "overload" argument, and at least compel reevaluation of the Court's case selection procedures, if a significant number of the cases chosen for plenary review represent improvident grants. The second allegation we consider -- the unresolved conflicts claim -- is directly tested by our examination of the cases denied review. Furthermore, if the Court is now hearing some cases that it need not hear, once these cases are removed from the docket, the Court thereby acquires additional appellate capacity for reaching presently unresolved intercircuit conflicts or for other purposes.

We will not address directly the incoherence claim -- that, because it is occupied with other tasks, the Court is unable to generate a sufficient number of decisions to bring coherence to federal law, even if all head-on conflicts are indeed resolved. It is certainly conceivable that the number of cases requiring such authoritative guidance exceeds the number of improvident grants we are able to identify or that the Court in any event will continue to hear the cases we have assigned to the improvident-grant category. We do not reject outright this argument, though we believe that it has not yet been offered with sufficient specification to command attention in this study. Proponents of a new national court who seize upon this contention should, in the first instance, shoulder the burden of defining what is meant by incoherence, of providing some quantitative assessment of the problem, of suggesting how the Court might identify such cases and ensure that they would be referred to an NCA, and of demonstrating how an additional layer of national yet unauthoritative appellate capacity can in fact minimize incoherence without generating new sources of doctrinal instability. The Article by Professors Estreicher and Sexton contributes to the debate on this point by assessing the hypothesis that a significant portion of the Court's present capacity is misutilized (and perhaps might more productively be devoted to other types of cases), as well as by assessing the costs of creating a new national court.

The same can be said of the argument that, whatever the objective reality, the Court feels overwhelmed by its responsibilities and would appreciate the ability to influence decision in a number of cases that it presently lacks capacity to hear, through referral to a new national appellate court. If these cases are not already captured by our priority-docket conception or not already embraced by the incoherence claim, it remains to be shown why they must be decided in any given year. We also do not know whether this subjective perception on the Court's part would persist even after criteria of case selection and accompanying procedures were developed that would permit a self-conscious management of its docket, or indeed whether the perception would persist even after creation of a new court. In sum, while the Article does not refute it, we submit that this argument, too, suffers from insufficient specification.

III. THE CRITERIA FOR CASE SELECTION

The literature on the Supreme Court is marked by an unwillingness or inability to resolve conflicting visions of the Court's responsibilities. On one hand, almost all commentators agree that the modern Court can no longer serve as the tribunal of last resort, ensuring that justice is done in each individual case, though this point is grudgingly acknowledged. On the other hand, these same commentators persist in asserting that our system is in need of urgent reform because the Court cannot or will not intervene in every case implicating important issues of federal law; they either contend or imply that, as a result, we must tolerate the absence of authoritative national rulings in a great many areas. Thus, the present critical analysis of the Court fails to consider the implications of the concession that we no longer have a Supreme Court of guaranteed last resort (and cannot recreate one by establishing new courts), that perhaps an increasingly complex, federated society demands a far different set of responsibilities of its "one Supreme Court."

The Supreme Court's case selection process is governed by Supreme Court Rule 17, which provides only the sketchiest and most frustrating standards for evaluating whether a case is "review-worthy." While Rule 17 identifies cases posing conflicts between circuit courts of appeals or state supreme courts as candidates for review by writ of certiorari, in the 1981 and 1982 Terms the Court identified such conflicts as a justification for a grant of certiorari in only about 30-35% of the cases accepted for review. Rule 17 provides virtually no guidance as to why the other 65-70% of the cases were granted review in those Terms. The Rule offers only vague and indeterminate "categories," such as cases calling for "an exercise of this Court's power of supervision," cases posing "an important question of federal law which has not been, but should be, settled by this Court," or cases "decid[ing] a federal question in a way in conflict with applicable decisions of this Court."

It is vaguely comforting that the Court is free to grant certiorari whenever a particular petition strikes it as meriting review, that the Court is potentially available for all significant questions of federal law. Under this view, however, the perception of overload is inevitable. For the Court to assume, and for students of the Court to insist upon, an unrealistic set of responsibilities is to ensure dissatisfaction and, more importantly, to forestall careful thinking about what the Court should be doing. What is needed, we submit, is a realistic vision for the Court -- one capable of yielding a manageable yet principled agenda and one responsive to fundamental premises of the system.

We do not presume to offer a definitive guide to the Court's exercise of discretion in handling its certiorari docket. Such an effort would be hopelessly quixotic and is unnecessary for our present purpose, which is merely to evaluate the arguments made in support of an intercircuit appellate court. As we see it, our task is to develop a vision of the Court's role that explains what it can realistically be expected to do, whether or not new national courts of appeals are engrafted onto the system. Armed with that vision, we hope to offer a conception of the Court's docket that both permits a rigorous assessment of the case for a new court and helps the Court begin the process of self-conscious management of its docket.

We urge, in essence, a reconceptualization of the Supreme Court's position in the legal system recognizing the inappropriateness of a 19th century style of direct intervention and adopting instead a model of the Court as manager of the process of developing sound, nationally-binding federal law. In today's world, the Court can no longer act to ensure that justice is done in the individual case, but it has overall managerial responsibility for a legal system whose product is justice. Its authority and responsibility flow from its unique position as the only institution in our society capable of an authoritative, final judicial resolution of a controversy governed by federal law. In constitutional law, the finality of the Court's decisions is virtually unshakeable (despite occasional overruling of precedent). Even with respect to statutory and common-law questions, the Court's rulings enjoy a practical finality given the strong policy of *stare decisis* accorded to such resolutions and the hurdles that lie in the path of legislative action in our system.

The Court, however, neither can nor should seek, nor should it be expected to seek, to finalize the law's development at each available opportunity. First, the Court cannot issue definitive rulings on every important federal question appearing on its docket -- unless, of course, we are prepared to so radically expand its membership and bureaucratize its processes that we would be left with a very different institution. Second, apart from considerations of docket capacity -- which are important and persist whether or not new national courts are created -- the Court should act with great care before it finalizes the resolution of a question of federal law. The caution reflected in the common law's commitment to interstitial lawmaking carries even greater force in the context of a Court whose pronouncements command virtually complete finality in our legal system.

Thus, we offer our metaphor of the Court as manager. A wise, effective manager does not, and is not expected to, intervene in every case. Rather, he or she establishes and polices a framework for the exercise below of delegated responsibility. The Court, by analogy, should intervene only when a binding, authoritative decision is truly demanded. Absent relatively rare justifications for immediate intervention, the Court as manager should accord a presumption of regularity or validity to the decisions of lower courts and should defer articulation of binding national law until all of the issues have been sufficiently ventilated after a period of percolation in the state and lower federal courts.

Our view of the Court as manager is committed in substantial measure to the policy of "percolation" -- that it is ordinarily best for the Court, as manager, to stay its hand until there has been a period of exploratory consideration and regional experimentation by the lower federal and state courts. Thus, we embrace lower-court percolation as an affirmative value rather than simply a rule of administrative convenience. The views of the lower courts on a particular legal issue provide the Supreme Court with a means of identifying significant rulings as well as an experiential base and set of doctrinal materials enabling the Court to fashion sound binding law. Moreover, the percolation process encourages the lower courts to act as responsible agents in the process of development of national law. The Court should exercise its managerial authority so as to encourage litigants to seek lower court resolution of intercourt conflicts, and the lower courts to preserve disagreements only in cases truly calling for Supreme Court intervention.

Given this vision, we suggest that the Court's docket may be viewed as having three parts. One part, the "priority docket," constitutes those cases that, in our view, have a priority call on the Court's time and energies -- the cases in which the Court as manager must intervene. A second part, the "discretionary docket," encompasses those cases that do not have a priority call on the Court's time and energies, but that, given excess capacity, the Court reasonably may choose to hear -- the cases in which the manager reasonably may choose to intervene. The final part, the "improvident docket," consists of those cases which are simply not "cert-worthy" under our criteria -- that is, in which the Court should not intervene.

The vision that unifies our conception of the priority docket is that the Court's principal, overriding responsibility is to preserve the unity of federal law where unity is necessary, including umpiring critical disputes between and among the divided authorities of our federal system (whether federal versus state, interbranch, or state versus state). Only after this work is done should the Court set about the job of directing doctrinal development and correcting errors of general significance -- tasks that we have assigned to the discretionary docket. Structural indicia help identify the priority cases; intervention generally should not turn on the Justces' subjective assessment of the significance of the legal issues involved.

For example, we regard the resolution of conflicts among courts -- whether state or federal and whether the issue is one of federal constitutional, statutory, or common law -- as one of the Court's principal obligatory tasks. Our managerial conception of the Court's role works only if the Court is prepared to take seriously its conflict-resolution responsibility. As an illustration of criteria developed in our Article, we set forth here at some length our notion of the Court's role in this area.

A conflict is a holding of two or more courts -- federal courts of appeals or state courts of last resort -- taking contrary positions on the same legal issue; it becomes cognizable only when courts in a given jurisdiction -- federal circuit or state -- are bound to follow a legal rule contrary to the rule that must be followed in another jurisdiction.*

However unaesthetic they may seem, even square conflicts among two or more courts do not necessarily present a compelling case for review -- and thus for inclusion on the Court's priority docket. For various reasons, some conflicts are "tolerable" and thus do not implicate the Court's conflict-resolution role. In our view, a conflict becomes "intolerable" only when further percolation is unlikely to be fruitful, when litigants are able to affirmatively exploit conflicts through forum shopping, or when the planning of primary behavior is thwarted by the absence of a nationally binding rule.

A conflict may be deemed intolerable when it persists even after sufficient lower-court percolation. There comes a point when the percolation process has been fully exhausted. The question, of course, is when should the Court finalize the process of law development. At the theoretical level, that point comes when the costs of persistent disuniformity in the legal standard exceed the marginal benefit of additional percolation. No hard-and-fast measure is available for fixing that point, however; the inquiry ultimately turns on the Court's own subjective assessment as to whether the particular issue is ripe for definitive resolution.

In the two studies, we have taken the view that a conflict becomes intolerable, and thus a candidate for the priority docket, when at least three courts have passed on the question. Although both studies present data on two-court conflicts among the cases considered during the 1982 Term, the value of percolation as a means of improving the Supreme Court's decisional product is enhanced when the Court has the benefit not only of two conflicting views but also of a possible third, intermediate position, as well as evidence of a possible trend among the courts. Moreover, realignment becomes more likely if the Court awaits the consideration of a third lower court.

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*/ Where a federal court of appeals or state supreme court in dicta or as part of an alternative holding has stated its opposition to another court on a question of law, no square conflict exists. The lower courts within the jurisdiction are not necessarily obligated to adhere to such dicta or alternative grounds. Moreover, and more important for our purposes, legal positions stated in dicta or alternative holdings often are not the product of the same thoroughgoing deliberation that characterizes holdings that are the sole basis for the court's decision. The full advantages of percolation have not been achieved and the federal court of appeals or state supreme court might, upon further consideration in a later case, reassess its position so as to eliminate any conflict. The federal court of appeals or state supreme court should be permitted -- indeed, encouraged -- to reconsider dicta or alternative holdings in light of emerging conflicting signals from other courts. This not only relieves the Supreme Court of the burden of unnecessarily resolving conflicts that would be resolved below, but it also emphasizes the responsibility of the lower courts to reconcile differences, where possible, preserving their position only in cases truly calling for Supreme Court intervention. The Note tracing the subsequent history of the conflicts identified in the Hruska Commission Report suggests that realignment occurs with considerable regularity and should be further encouraged by the Supreme Court's prudent invocation of its certiorari jurisdiction.

We concede that this measure of intolerability is overinclusive. Appropriate percolation often requires consideration by more than three courts. For example, three courts' decisions may not be enough evidence of a trend, or the one circuit out of line with the trend may have been the first to pass on the matter and may not have the opportunity to consider realignment, or it may have been decided prior to what is determined to be a controlling Supreme Court ruling. Moreover, there are situations where the Court may wish to encourage circuit-by-circuit experimentation, typically in matters of trial procedure, where a "law of the circuit" approach presents a distinctly tolerable state of affairs and reference to the federal rulemaking process or the legislature may be preferable to Supreme Court resolution. There may also be cases presenting conflicts over issues that many, including the Justices, deem too trivial to warrant the attention of a national tribunal. Furthermore, there may be issues that the Court is simply not ready to resolve, even after virtually every circuit has taken a position on the matter. "Defensive denials" are similarly present when for strategic reasons particular Justices vote to deny certiorari even though the issue is fully percolated and merits review. Thus, although the student Notes will in fact discuss every conflict the Court declined to resolve during the 1982 Term, they also frequently identify reasons not captured by our criteria that might justify the Court's denial of review.

A second indicator of "intolerability" is the potential for forum shopping and the impact on multicircuit actors who are unable to plan their affairs because of intercourt conflict. The Court may properly stay its hand, and await further percolation of an issue, where a conflict between lower courts has little impact on primary behavior -- that is, where the parties cannot by forum selection engineer a change in the applicable law or where their activities are localized within a particular circuit or state. Disuniformity in the law becomes truly intolerable when actors are able to bring themselves under radically different legal regimes through forum choice or are unable readily to adjust their affairs to the law's divergent commands. The value of additional percolation is ordinarily outweighed by these costs of disuniformity. Thus, for purposes of this study, we maintain that where forum shopping or impact on multicircuit actors is present, the Court should ordinarily hear a case presenting a conflict without awaiting consideration by a third court. Congress would also be well advised, however, to explore avenues for elimination of forum shopping either through modification of federal venue rules, or, as a Note in the Project suggests, through stipulation of choice-of-law rules that would apply irrespective of the place of venue.

The other categories of cases meriting inclusion in the priority docket are developed extensively in the full study. Here, we merely list them:

> cases posing profound "vertical federalism" disputes, as when a federal court strikes down a state or local statute on federal constitutional or statutory grounds or when a state court invalidates a federal statute or treaty;
>
> cases requiring the Court to resolve serious disputes between the branches of the federal government, such as a federal court's invalidation of a federal statute or executive order
>
> cases of disputes between states; and
>
> cases presenting conflicts with Supreme Court precedent.

The Court's first obligation, in our view, is to decide the cases on the priority docket, and only then should it turn to those on the discretionary docket. Among the categories of cases belonging on the discretionary docket are:

> cases where there is reason to be suspicious of the forum's consideration of the federal question (as when a state court upholds a state statute against federal constitutional challenge);
>
> cases where considerations of vertical federalism press for Supreme Court review (as when a federal court invalidates nonstatutory state action on federal constitutional or statutory grounds);
>
> cases involving a significant interference with federal executive responsibility (as when a federal court invalidates a federal administrative regulation of general application or truncates the reach of a federal statute in order to avoid collision with a perceived constitutional interest);
>
> cases requiring the Supreme Court to exercise its extraordinary powers of supervision;
>
> cases where review is sought from a court of exclusive jurisdiction (such as the Court of Appeals for the Federal Circuit).

We also recognize a place on the discretionary docket for cases presenting the Court with opportunities for strategic intervention to announce new doctrine, to overrule precedent, or to attempt to bring coherence to an area of law. We point out, however, that such occasions for granting review to "vehicle" cases should be carefully selected, lest this category swamp the entire discretionary docket. This "vehicle" rationale is available, in our view, only where a recent previous Supreme Court decision has specifically reserved decision of an issue and that reservation has spawned unanticipated litigation, or where two Supreme

Court rulings appear to be hopelessly in conflict, or where a petition can demonstrate a level of doctrinal incoherence in the lower courts (falling short of a review-worthy conflict but calling for authoritative appellate guidance), or where the Court wishes to signal its predisposition to reconsider established law, or where the case is related to a case already granted review and should be considered in tandem with that case.

A decision to grant review of a case not falling within one of the priority or discretionary categories should be regarded as improvident. A few general propositions may be offered about the improvident grants. First, intercourt conflicts concerning an issue passed on by only two courts and not presenting problems of forum shopping or planning by intercircuit actors should not be heard, in the absence of some other basis for priority or discretionary review. Second, the Court should not review a federal court's resolution of an issue of nonconstitutional law in the absence of an "intolerable" conflict or one of the grounds for a priority or discretionary grant. The availability of appeal to the legislative process and the absence of vertical federalism difficulties argue against a grant. Third, the Court should never grant review to decide questions of state law, but rather should permit the state courts to rectify any erroneous federal reading of state law. Finally, cases in which a state court has invalidated state action on a federal ground should not be heard by the Court in the absence of a conflict or a decision to treat the case as a vehicle for a major pronouncement of federal law. Without further percolation, there is ordinarily little reason to believe that such an issue is one of recurring national significance; and correction of error, even regarding a matter of constitutional law, is not a sufficient basis for Supreme Court intervention. Here, unlike a federal court's invalidation of state action, structural justification for intervention is generally missing, given the absence of vertical federalism difficulties and the built-in assurance that state courts functioning under significant political constraints are not likely lightly to invalidate state action even on federal grounds. Indeed, it was not until the latter part of the nineteenth century that the Supreme Court even had appellate jurisdiction to hear such cases. We recognize that a state court's ruling premised on the federal Constitution would be immune from correction by ordinary political processes, and certainly if there is reason to believe that a particular state supreme court is systematically disregarding the Supreme Court's decisions or setting itself against the general tenor of its rulings, the Court could intervene under a supervisory or vehicle rationale. It should not grant, however, merely to correct perceived error.

Our criteria are presented with a heuristic design: to offer an illustration of the need to systematize and clarify the Court's standards for case selection to provide guidance to litigants and the legal community. We do not think it fundamentally naive to suggest that the Court begin the process of publicly formulating meaningful criteria for case selection and developing appropriate supportive procedures to ensure a self-conscious management of its docket. We think there is enough room for the differing political agendas of the individual Justices in our discretionary docket. Our minimal claim is that such a process be undertaken and its fruits evaluated before a new layer of appeal of necessarily limited finality is introduced into our judicial system.

IV

AN ANALYSIS OF THE CASES GRANTED REVIEW DURING THE 1982 TERM

The Court granted review in 165 cases during the 1982 Term. As Figure 1 indicates, 48% (seventy-nine) were on the priority docket, 28% (forty-seven) were on the discretionary docket, and 24% (thirty-nine) were improvident grants.

FIGURE IV-1
TRIPARTITE BREAKDOWN OF DOCKET, 1982 TERM

Category	Number 1/	Percentage
Priority Docket	79	48
Discretionary Docket	47	28
Improvident Grants	39	24
Total	165	100.00

Figures 2 through 4 indicate that the relative size of the three categories changes only slightly if one excludes summary dispositions, appeals, or the cases that most likely would not have been reviewed had the Court's obligatory jurisdiction been abolished. Thus, assuming that the 1982 Term is representative, nearly one-half of the cases the Court hears are cases that the Court must hear (the priority docket); nearly one-third of the cases are cases that the Court properly may hear (the discretionary docket); and about one-fourth are cases that the Court should not have heard.

1/ For this and the following tables, petitions or jurisdictional statements arising out of the same lower-court decision are counted as one case.

FIGURE IV-2
TRIPARTITE BREAKDOWN OF PLENARY DOCKET, 1982 TERM --
EXCLUDING SUMMARY DISPOSITIONS

Category	Number	Percentage
Priority Docket	67	48
Discretionary Docket	43	30
Improvident Grants	31	22
Total	141	100.00

FIGURE IV-3
TRIPARTITE BREAKDOWN OF CERTIORARI DOCKET, 1982 TERM --
EXCLUDING APPEALS

Category	Number	Percentage
Priority Docket	61	47
Discretionary Docket	37	28
Improvident Grants	33	25
Total	131	100

FIGURE IV-4
TRIPARTITE BREAKDOWN OF DOCKET, 1982 TERM --
EXCLUDING THE INFUENCE OF THE COURT'S OBLIGATORY JURISDICTION 2/

Category	Number	Percentage
Priority Docket	75	49
Discretionary Docket	44	29
Improvident Grants	33	22
Total	152	100

Figure 5 offers an analysis of the obligatory appeals:

FIGURE IV-5
TRIPARTITE BREAKDOWN OF APPELLATE DOCKET, 1982 TERM --
EXCLUDING PETITIONS FOR CERTIORARI

Category	Number	Percentage
Priority Docket	18	53
Discretionary Docket	10	29
Improvident Grants	6	10
Total	34	100

Of the 34 appeals heard on the merits and not dismissed during the 1982 Term, more than one-half belonged on the priority docket, and only 18% (six) were improvident grants under our criteria. If the Court's

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2/ Excluding cases that the Court, in all likelihood, would not have heard had obligatory jurisdiction been abolished. See Fig. IV-5.

obligatory jurisdiction had been abolished, the Court would not have been required to hear four of the priority grants and three of the discretionary grants. Thus, abolishing obligatory jurisdiction could have reduced the Court's docket for the 1982 Term by 8% (13 cases). Repeal of obligatory jurisdiction would also have freed the Court of the burden of having to act on each appeal, and of the dilemma of creating binding precedent by summary disposition.

For the remainder of this chapter, we briefly analyze the priority and discretionary dockets and then turn to description and evaluation of the improvident grants.

A. THE PRIORITY DOCKET

The priority docket is summarized in Figure 6:

FIGURE IV-6
ANALYSIS OF PRIORITY DOCKET, 1982 TERM

Type	Number	Percentage
Intercourt Conflict	60	76
Resolution of Interbranch Disputes	5	6
Federal Invalidation of State Statute	9	11
Conflidt with Supreme Court Precedent	5	6
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Total	79	100 3/

Of the seventy-nine cases on the priority docket, 76% (sixty) involved intercourt conflicts; only nine cases involved federal decisions invalidating state statutes, and five involved federal decisions invalidating federal statutes. Three cases were appeals involving the invalidation of statutes, but the courts in these cases did not clearly invalidate the statutes. We believe that these grants are more convincingly grounded on an intercourt conflict rationale. The high proportion of conflict cases on the Court's docket -- 36% of the cases the Court agreed to hear during the Term -- demonstrates that the Court takes seriously its conflict-resolution responsibility.

The incidence of intercourt conflict is summarized in Figure 7:

3/ Percentages do not add to 100% because of rounding.

FIGURE IV-7
ANALYSIS OF INTERCOURT CONFLICTS, 1982 TERM

Type		Number	Percentage
Three-Court (or More) Conflicts		55	33
Priority	55		
Discretionary	0		
Improvident	0		
Two-Court Conflicts		17	10
Priority	5		
Discretionary	7		
Improvident	5		
Total Cases Presenting Two-Court (or More) Conflicts		72	44
Number of Cases Not Involving Conflicts		93	56

Of the fifty-eight conflict cases on the priority docket, fifty-three presented conflicts involving three or more courts. Of the five that presented two-court conflicts, four were in the tax, labor, and civil rights areas, and were placed on the priority docket because of the significant potential for forum-shopping and impact on planning by multi-circuit actors.

Five cases -- 6% of the priority docket -- presented conflicts with Supreme Court precedent. Of course, virtually every case heard by the Court could plausibly be viewed as in conflict with the Court's past rulings. The law develops through dialectical evolution; cases appear on the scene to extend or to contract existing doctrine. Generally, this process should take place at the lower-court level until full percolation of the issues has occurred. But the Court need not and should not tolerate lower-court rulings that present bald or thinly-disguised attempts to circumvent controlling principles. Although such cases are relatively rare, there are situations in which fairly extensive percolation has occurred and the Court may properly intervene to review a decision plainly in tension with its past rulings. An obvious example would be a case presenting both a two-court conflict and a substantial claim of conflict with Supreme Court precedent. A case in point is No. 82-195, *Mueller v. Allen*, where the Eighth Circuit validated a Minnesota statute that provided taxpayers a deduction for the tuition, textbook, and transportation expenses of students enrolled in elementary and high schools. The appeals court acknowledged the contrary ruling of the First Circuit and the doubtful validity of the Minnesota statute under *Committee for Public Education & Religious Liberty v. Nyquist* (1973). *Nyquist* was distinguishable, in the Eighth Circuit's view, because the Minnesota statute applied to parents of public-school children as well as parochial-school children, and offered a benefit tied to actual school-related expenditures. Given the two-court conflict and the slight differences from the statute invalidated by the Court in Nyquist, however, a priority grant was plainly indicated.

B. THE DISCRETIONARY DOCKET

Figure 8 offers an analysis of the discretionary docket:

FIGURE IV-8
ANALYSIS OF DISCRETIONARY DOCKET, 1982 TERM

Type	Number	Percentage
Structural Suspicion	9	19
Vertical Federalism	4	9
Significant Interference with Federal Executive Responsibility	13	28
Vehicles for Advances in the Development of Federal Law	15	32
Miscellaneous	6	13
Ruling from a Court of Exclusive Jurisdiction	1	
Serious Risk of Dislocation	1	
Supervisory Power	1	
Ruling Implicating Supreme Court's Jurisdiction	1	
Ruling Related to Recently Decided Cases	2	
Total	47	100 a/

1. Vehicles for Advances in the Development of Federal Law

Fifteen cases (32%) presented vehicles for advances in the development of federal law. We reiterate that under our criteria it is not sufficient that the Court wishes to consider a particular issue, even if that issue had been previously identified and reserved for decision. In essence, appropriate vehicles arise in four settings: (1) prior reservation of an

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a/ Percentages do not add to 100 because of rounding.

issue has generated unexpected and undesired doctrinal development which only the Court can stop; (ii) lower-court rulings on an issue display a level of doctrinal incoherence and disarray falling short of an outright conflict yet providing sufficient percolation to permit Supreme Court intervention; (iii) the Court wishes to reconsider a well-established principle and, after identifying its willingness to re-evaluate prior doctrine, sets the law on a new path; (iv) in the interest of efficiency and to benefit from comparative evaluation of an issue, the Court hears a case because it raises issues related to a case where it has already granted review.

Examples of each can be found among seven discretionary "vehicle" grants. In No. 81-2386, *DelCostello v. International Brotherhood of Teamsters*, and in No. 81-2408, *United Steelworkers of America v. Flowers*, the Court was presented with an opportunity to decide which statute of limitations should govern an employee's fair-representation suit against his union. In *United Parcel Service, Inc. v. Mitchell* (1981), the Supreme Court had endorsed the application of state statutes of limitations for vacation of arbitration awards in employer-employee disputes. However, *Mitchell* never reached the question of which statute of limitations should govern an employee's claim against his union. Although a square conflict regarding the applicability of a state statute of limitations or the six-month period provided by section 10(b) of the National Labor Relations Act had yet to surface, the lower court decisions in this area displayed considerable doctrinal incoherence. Most of this incoherence was directly attributable to *Mitchell*, which inadvertently created the anomalous possibility that different limitations provisions would govern an employee's suits against his union and against his employer. Only the Supreme Court could clarify the intended reach of *Mitchell*. *DelCostello* and *Flowers* provided the Court with such an opportunity. Similarly, in No. 82-1367, *Roadway Express, Inc. v. Warren*, the Court appropriately granted review to try again to develop a majority position, found to be elusive in *Thomas v. Washington Gas & Light Co.* (1980), on a full-faith-and-credit issue of recurring significance.

No. 81-757 et al., *Allen v. Wright*, is an example of the second type of "vehicle" grant. There the Court granted review to determine which of two seemingly conflicting lines of Supreme Court decisions would govern standing to compel federal agency enforcement of antidiscrimination laws. Similarly, in No. 82-1260, *Copperweld Corp. v. Independent Tube Corp.*, the lower courts had staked out a myriad of positions on the appropriate treatment under the federal antitrust laws of a conspiracy between a parent corporation and its wholly-owned subsidiary. There had been extensive lower-court percolation, which commentators unanimously maintained left the law in a state of hopeless disarray and confusion. In such circumstances, a vehicle grant was appropriate.

The third type of "vehicle" grant was present in No. 82-23, *Marsh v. Chambers*, involving the constitutionality of a state legislature's retention of a sectarian minister to open its legislative sessions. Apparently, the Court granted review to reconsider the standards for establishment clause scrutiny set out in *Lemon v. Kurtzman* (1973). Similarly, the decision rendered in *Copperweld* indicates that the Court was prepared to reconsider its prior decisions and recognize that a corporation and its wholly-owned subsidiaries are incapable of conspiring with each other for the purposes of antitrust law.

No. 82-485, *Keeton v. Hustler Magazine, Inc.*, is an example of the fourth type of "vehicle" grant. Although *Keeton*, standing alone, might have been an improvident grant, it raised issues related to No. 82-1401, *Calder v. Jones*. *Calder* was a proper discretionary grant to resolve doctrinal incoherence in the lower courts. The Court appropriately considered *Keeton* along with *Calder* in an effort to clarify the assertion of *in personam* jurisdiction over writers, editors, and publishers of multi-state publications charged with libel or defamation and arguably suable in every state of publication.

2. *Significant Interference with Federal Executive Responsibility*

The second largest category of the discretionary docket, 28% (thirteen cases), involved cases presenting a significant interference with executive responsibility. A number of these cases involved invalidation of a federal agency regulation of national applicability. An equal number fell short of invalidating a national regulation, but presented serious claims of interference with executive responsibility. In these cases, either significant percolation of the underlying issue has occurred, or the federal government could not readily confine its compliance to the particular jurisdiction. For example, in Nos. 81-2399 et al., *Metropolitan Edison Co. v. People Against Nuclear Energy*, the District of Columbia Circuit addressed whether psychological effects need be considered in environmental-impact statements. Although not squarely in conflict with the rulings of the other circuit courts that had considered the question, the District of Columbia Circuit's novel environmental-impact analysis threatened to impose a significant burden on the federal licensing of nuclear reactors. Similarly, in No. 82-1371, *Heckler v. Day*, the Second Circuit considered an issue previously addressed by a number of other circuit courts: the appropriate judicial role in controlling delay in the administration of the Social Security Act's disability program. The Second Circuit's imposition of deadlines in disability adjudication was bound to affect other jurisdictions, not only because of the influence of precedent but also because of the need to shift scarce adjudicative resources, perhaps from cases in other circuits, to effect compliance with the Second Circuit's deadlines.

3. "Structural Suspicion"

The next largest category -- nine cases (19%) -- involved state court rulings sustaining state action against federal challenge. In this context, there is a structural basis for suspicion of the forum's receptivity to the federal claim. In the interest of preserving the supremacy of federal law, the Court may act in advance of a conflict or significant lower-court percolation.

Typically, the "structural suspicion" factor does not stand alone. For example, in No. 82-500, Southland Corp. v. Keating, a two-court conflict provided additional justification for a grant to review the California Supreme Court's refusal to find the Federal Arbitration Act preemptive of a state regulatory statute's anti-arbitration policy. Ooccasionally, a serious claim of conflict with Supreme Court precedent is present in a state decision rejecting a federal claim. For example, in No. 82-11, Mennonite Board of Missions v. Adams, the Indiana intermediate appellate court's holding that due process required no more than constructive notice to mortgagees of a pending tax sale jarred with the Supreme Court's disenchantment with constructive notice in Mullane v. Central Hanover Bank & Trust Co. (1950) and its progeny. In other cases, a state court had sustained plainly protectionist legislation, as in No. 82-1565, Bacchus Imports, Ltd. v. Freitas. But even where no additional feature is present, the Court may act to police state court responsibilities under the supremacy clause even though the occasion may not otherwise be ideal for the definitive declaration of federal law.

4. "Vertical Federalism"

Four cases (9%) involve considerations of "vertical federalism" -- where a federal court has invalidated state action. As in the "structural suspicion" category, the vertical federalism element also tends not to stand alone. Thus, in No. 82-492, Solem v. Helm, there had been considerable lower-court percolation, though no square conflict. The Eighth Circuit's ruling voiding a life sentence to a habitual offender who had pleaded guilty to a felony charge of uttering a "no account" check for $100, clashed with the Court's recent eighth amendment jurisprudence in

Rummel v. Estelle (1980) and *Hutto v. Davis* (1982). Typically, the cases involved federal rulings finding federal preemption of areas of significant state regulatory involvement, as in No. 81-2159, *Silkwood v. Kerr-McGee Corp.*, and No. 81-2257, *Bill Johnson's Restaurants, Inc. v. NLRB*.

In criminal proceedings, it should be noted, the mere fact that a federal court voids a state conviction on federal habeas corpus review does not justify a discretionary grant, for Congress specifically contemplated such "dialectical federalism" as a fairly regular feature of our criminal justice system. It is only when the state court persists in its view after the initial federal habeas reversal that the state-federal conflict is ripe for a discretionary grant.

5. Miscellaneous Discretionary Grants

No one theme unites the remaining six cases (13% of the discretionary docket). We were surprised to find only one case (No. 82-1071, *Aluminum Co. of America v. Central Lincoln Peoples' Utility District*) in which a grant was justified solely on the ground that the decision was issued by a court of exclusive jurisdiction. Only one case was premised principally on the supervisory-authority rationale; the Court granted review in No. 82-91, *INS v. Phinpathya*, to undo the Ninth Circuit's persistent efforts to dilute the continuous physical presence requirement for suspension of deportation. One case fell in the discretionary category for decisions involving the application of settled Supreme Court precedent to situations involving a risk of serious dislocation: In No. 81-2149, *Solem v. Stumes*, the Court granted review to decide the question of the retroactive application of *Edwards v. Arizona* (1981). One grant (No. 82-874, *Schweiker v. Edwards*) was premised on a lower court ruling implicating the Court's own appellate jurisdiction. Finally, two cases apparently were "held over" as cases related to decisions made in the previous term.

C. THE IMPROVIDENT GRANTS

We now turn to the improvident grants, which are analyzed in Figure 9.

FIGURE IV-9
ANALYSIS OF IMPROVIDENT GRANTS, 1982 TERM

	Number	Percentage
Extent of Overgranting		
Improvident Grants	39	24 (Base = 165)
Cases Meriting Plenary Review	31	22 (Base = 141)
Discounting Influence of Obligatory Jurisdiction	33	22 (Base = 152)

FIGURE IV-9
(CONTINUED)

Extent of Reversal

(Harvard Law Review's statistics for disposition of cases reviewed on writ of certiorari and decided by full opinion, 97 Harv. L. Rev 299 (1983), in parentheses)

Affirmed	16 (42)	41 (33.)
Reversed (includes affirmed in part and reversed in part)	21 (75)	54 (59)
Vacated (includes affirmed in part and vacated in part)	1 (10)	2.5 (8)
Dismissed	1 (0)	2.5 (0)

Excluding Appeals (6)

Affirmed	10 (42)	30 (33)
Reversed	21 (75)	64 (59)
Vacated	1 (10)	3 (8)
Dismissed	1 (0)	3 (0)

Categories of Improvident Grants

(Harvard Law Review's breakdown for dispositions with full opinion, see 97 Harv. L. Rev 302 (1983), in parentheses)

Civil	23 (129)	59 (80)
Criminal (including habeas corpus)	16 (33)	41 (20)
State	7 (29)	18 (18)
Federal	32 (133)	82 (82)

Origins of Improvident Grants

3-judge district court	5
CA 1	3
CA 2	2
CA 3	1
CA 4	3
CA 5	4
CA 6	2
CA 7	1
CA 8	0
CA 9	4
CA 10	1
CA 11	2
CA DC	4

FIGURE IV-9
(CONTINUED)

Causes of Overgranting	Number	Percentage
Obligatory Jurisdiction	6	15
State Court Invalidation of State Action	6	15
Deference to Solicitor General	4	10
Inappropriate Vehicle	4	10
Two-Court Conflicts	4	10
False Conflicts	5	13
Reconsideration of Supreme Court Precedent in light of Recent Supreme Court Rulings Without Awaiting Percolation	2	5
Error Correction	8	21
Unusual Rulings	3	
Expansive Ruling	1	
Fact-Specific	4	

Out of 165 cases, there were thirty-nine improvident grants, or 24% of the total. If one looks only at the cases receiving plenary review, Figure 2 indicates that there were thirty-one improvident grants, or 22% of the total. And if one excludes the cases that, in all likelihood, would not have been heard were the Court's obligatory jurisdiction abolished, Figure 4 reveals that there were thirty-three improvident grants, or 22% of the total. However the data are analyzed, nearly one out of every four cases that the Court agreed to hear should not have been reviewed under our criteria.

Analyzing the thirty-nine improvident grants by subject matter reveals that twenty-three involved civil claims and sixteen involved criminal prosecutions (including habeas review). Compared to the Harvard Law Review's breakdown for dispositions with full opinions during the 1982 Term (129 civil cases and thirty-three criminal and habeas cases), it is clear that a disproportionate number of improvident grants arise out of criminal prosecutions or federal habeas review. To some extent, this disproportionality may be attributed to our criteria which emphasize the importance of intercourt conflicts for placement on the priority docket, discount (as noted) the state-federal disagreement in particular habeas cases, and reject a state court's invalidation of state action on federal grounds, standing alone, as an appropriate occasion for discretionary review. If the reader agrees with our criteria, the conclusion is inescapable that the Court is too quick to grant review in criminal cases.

As to the court of origin of improvident grants, Figure 9 indicates that federal courts are the principal source of overgranting. No one federal circuit appears to be principally responsible, although the Fifth, Ninth, and District of Columbia Circuits each accounted for 4 improvident grants -- amounting to twelve (31%) of the total.

We list below the 39 cases which, under the Project criteria, belong on the improvident docket. A brief discussion of each, and of our reasons for placing it on the improvident docket, is set forth in the Appendix to this Summary.

(1) No. 81-1374, *Blum v. Stenson*, ___ F.2d ___ (2d Cir. 1981).

(2) No. 81-1843, *Illinois v. Andreas*, 100 Ill.App.3d 396, 426 N.E.2d 1078 (1st Div. 1981), *app. denied*, 88 Ill.2d 20 (1982).

(3) No. 81-1857, *Oregon v. Bradshaw*, 54 Or. App. 949, 636 P.2d 1011 (1981), *rev. denied*, 292 Or. 568 (1982).

(4) No. 81-1859, *Illinois v. Lafayette*, 99 Ill.App.3d 830, 425 N.E.2d 1383 (3d Dist. 1981).

(5) No. 81-1891, *Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs*, 670 F.2d 208 (D.C. Cir. 1981).

(6) No. 81-1893, *California v. Ramos*, 30 Cal.3d 553 (1982).

(7) No. 81-2066 (A), *Anderson v. Harless*, ___ F.2d ___ (6th Cir. 1982).

(8) No. 81-2169, *Haring v. Prosise*, 667 F.2d 1133 (4th Cir. 1981).

(9) No. 81-2318, *Florida v. Casal*, 410 So.2d 152 (Fla. 1982).

(10) No. 81-2332, *Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Co.*, 674 F.2d 298 (4th Cir. 1982).

(11) No. 82-39 (A), *Hispanic Coalition on Reapportionment v. Legislative Reapportionment Commission*, ___ F. Supp. ___ (E.D.Pa., April 6, 1982) (3-judge court).

(12) No. 82-52, *Arizona Governing Committee v. Norris*, 671 F.2d 330 (9th Cir. 1982).

(13) No. 82-63, *City of Revere v. Massachusetts General Hospital*, 434 N.E.2d 185 (Mass.1982)

(14) No. 82-215, *United States v. Whiting Pools, Inc.*, 674 F.2d 144 (2d Cir. 1982).

(15) No. 82-242, *Ruckelshaus v. Sierra Club*, 672 F.2d 33 (D.C. Cir. 1982).

(16) No. 82-271, *Chardon v. Soto*, 681 F.2d 42 (1st Cir. 1982).

(17) No. 82-284 (A), *International Association of Machinists v. Federal Election Commission*, 678 F.2d 1092 (D.C. Cir. 1982) (en banc).

(18) No. 82-357, *Michigan v. Clifford*, [cites needed].

(19) No. 82-360 (A), *Burton v. Hubble*, XXX F.Supp. XXX (M.D.Ala. June 21, 1982) (3-judge court).

(20) No. 82-372, *Federal Trade Commission v. Grolier, Inc.*, 671 F.2d 553 (D.C. Cir. 1982).

(21) No. 82-472, *Russello v. United States*, 681 F.2d 952 (5th Cir. 1982) (en banc).

(22) No. 82-738, *Migra v. The Warren City School District Board*, 703 F.2d 564 (6th Cir. 1982).

(23) No. 82-940, *Hishon v. King & Spalding*, 678 F.2d 1022 (11th Cir. 1982).

(24) No. 82-945, *Sure-Tan, Inc. v. NLRB*, 672 F.2d 592 (7th Cir. 1982).

(25) Nos. 82-952 (A) et al., *State of Maryland v. United States*, XXX F.Supp. XXX (D.D.C.1982).

(26) No. 82-958, *McDonough Power Equipment, Inc. v. Greendwood*, 687 F.2d 338 (10th Cir. 1982).

(27) No. 82-1041, *Dickman v. Commissioner*, 690 F.2d 812 (11th Cir. 1982)

(28) No. 82-1080 (A), *Simon v. Davis*, XXX F. Supp. XXX (M.D.Pa. Sept. 13, 1983) (3-judge court).

(29) No. 82-1095, *Pulley v. Harris*, 692 F.2d 1189 (9th Cir. 1982).

(30) No. 82-1135, *McKaskle v. Wiggins*, 681 F.2d 226 (5th Cir. 1982).

(31) No. 82-1141 (A), *Common Cause v. Bolger*, XXX F.Supp. XXX (D.D.C.1982) (3-judge court).

(32) No. 82-1246, *Bose Corp. v. Consumers Union*, 692 F.2d 189 (1st Cir. 1982).

(33) No. 82-1326 et al., *Watt v. State of California*, 683 F.2d 1253 (9th Cir. 1982).

(34) No. 82-1330, *Thigpen v. Roberts*, 639 F.2d 132 (5th Cir. 1982).

(35) No. 82-1408(R), *Maggio v. Fulford*, XXX F.2d XXX (5th Cir. Nov. 29, 1982).

(36) No. 82-1432, *Pulliam v. Allen*, 692 F.2d 376 (4th Cir. 1982).

(37) No. 82-1453, *Badaracco v. Commissioner*, 693 F.2d 2983 (3d Cir. 1982)

(38) No. 82-1479, *Justices of Boston Municipal Court v. Lydon*, 698 F.2d 1 (1st Cir. 1982).

(39) No. 82-1496(R), *Cardwell v. Taylor*, XXX F.2d XXX (9th Cir. Sept. 15, 1982).

It is possible to identify some patterns or common factors that unify the cases on the improvident docket.

(a) *Error Correction*

We initially believed that much of the "overgranting" phenomenon could be attributed to the Court's supposed penchant to grant review without any structural justification where four or more Justices simply do not like the result below. Indeed, this might explain eight (21%) of the thirty-nine improvident grants (including the 3 summary reversals). The Court should not, in our view, grant review simply to ward off uninformed public reaction that the Court is validating a result by declining discretionary review.

On further reflection, however, there is reason to doubt whether the "mere error correction" thesis fully explains the extent of overgranting. When comparing the Harvard Law Review's statistics for disposition of cases reviewed on certiorari and disposed of by full opinion, and the extent of reversal of improvident grants herein (see Figure IV-9), it appears that these improvident grants were reversed no more frequently than the overall certiorari docket. Admittedly, however, if the six summary affirmances that came to the Court as appeals are excluded, a divergence does appear, with a 64% reversal rate for the improvident grants as compared to 59% for the overall certiorari docket. We doubt, however, whether this difference, if statistically significant, proves the "mere error correction" thesis.

We suspect that simply focusing on the actual results on the merits understates the influence of visceral disagreement with the result below. Although four Justices may vote to grant review, they may be unable to form a Court majority for reversal in a significant number of cases. Moreover, we expect that even the initial views of the four Justices voting to grant may be modified in light of the briefs and arguments in a given case.

In sum, it is difficult to say anything conclusive about the "mere error correction" thesis from this type of gross statistical inquiry. However, we think it likely that other factors, in addition to visceral reaction, contributed to a conclusion on the Justices' part that serious error was committed below and increased the likelihood of a grant of certiorari in the thirty-nine cases.

(b) State Court Invalidation of State Action

Along with the six obligatory appeals, six improvident grants involved state court rulings invalidating state action. This confirms a trend that Justices Brennan and Stevens and our colleague Laurence Sager have identified: the Court is increasingly concerned with state court activism in the name of the federal Constitution. We agree that the Court may properly grant review to resolve intercourt conflicts in such situations. However, there is no structural justification for issuing definitive declarations of federal law -- typically, constitutional law -- in advance of sufficient lower-court percolation.

(c) Deference to the Solicitor General

The Court's deference to the Solicitor General's views is a third factor warranting consideration. Four of the improvident grants may be attributed principally to the Government's recommendations. In fact, all four of these recommendations involved appellate decisions *of first impression*. A fifth case involved an alleged two-court conflict that, in our view, does not withstand analysis, and ultimately led to unanimous affirmance by the Court.

(d) *Treatment of Conflicts*

Nine of the improvident grants may be attributed to the Court's treatment of allegations of intercourt conflicts. In four of these cases (*Blum v. Stenson*; *Chardon v. Soto*; *Thigpen v Roberts*; and *FTC v. Grolier, Inc.*), we suspect that the Court perceived conflicts that did not withstand analysis. *United States v. Whiting Pools*, might also be added to this list. The other four cases (*Haring v. Prosise*; *Russello v. United States*; *Dickman v. Commissioner*; and *Badaracco v. Commissioner*) involved two-court conflicts which, on our criteria, should have been discounted. In *Haring*, the conflict was with a circuit ruling of ten years ago, and the Fourth Circuit's approach was the one most consistent with traditional collateral estoppel doctrine. Indeed, the Court unanimously affirmed the judgment in that case. In *Russello*, there was reason to believe that the contrary position of the Ninth Circuit was in a state of flux, and reason to doubt that the forfeiture rule in question would animate forum choice, even if available. The Court affirmed in this case as well. *Dickman* and *Badaracco* involved two-court conflicts without significant potential for forum-shopping or implications for planning by multi-circuit actors.

(e) *Inappropriate Vehicles*

At least four of the improvident grants (*Arizona Governing Comm. v. Norris*; *Migra v. Warren City School District Board of Education*; *Pulley v. Harris*; and *McKaskle v. Wiggins*) may have been viewed as vehicles. In these cases we suspect that the Justices deem a case to be certworthy simply because it deals with an issue on which the Court had reserved decision in a prior ruling. Prior reservations of issues occurred in *Norris*, *Migra*, and *Wiggins*. Prior reservation is not a sufficient condition for granting review; there should be reason to believe that the process of lower-court percolation cannot be confidently relied upon to work properly. *Pulley v. Harris* did not even present an issue that the Court had previously reserved. There, the Court acted prematurely in rejecting mandatory proportionality review -- an issue on which the Justices could not agree in *Gregg v. Georgia* (1976), *Proffitt v. Florida* (1976), and *Jurek v. Texas* (1976), and which might have profited from lower-court percolation.

(f) *Reconsideration in Light of Recent Supreme Court Rulings Without Awaiting Percolation*

At least two of the improvident grants (*Bose Corp. v. Consumers Union* and *Justices of Boston Municipal Court v. Lydon*) stemmed from the Court's desire to resolve immediately alleged conflicts with Supreme Court precedent -- "conflicts" that arise through lower courts' efforts to reconcile earlier rulings with recent Supreme Court cases. Thus, in Bose, for example, the First Circuit's de novo review of New York Times Co. v. Sullivan (1964) jury verdicts, while at one level in tension with Inwood Laboratories, Inc. v. Ives (1982) and Pullman-Standard v. Swint (1982), reflected the Court's insistence that first amendment principles required "clear and convincing" proof in libel cases and that the appeals court's job was to engage in a demanding review of the "constitutional fact" determinations. Whether this view indeed survives Inwood and Swint is a matter that should be left in the first instance to the percolation process.

In conclusion, we readily concede that much of what we have said rests on a statistically small base. We believe that we have chosen a year in which the Court took great care in selecting cases for review. If the reader disagrees with our judgment in a given case, it should be noted that our list of improvident grants understates the "overgranting" phenomenon, for at least a half dozen cases were assigned to the discretionary docket in the interest of maintaining as conservative a statement of our results as would be consistent with our criteria.

If our criteria are accepted, there is reason to believe that some additional capacity is presently available to thr Court for resolution of other cases, for devoting more time to the process of case selection, or for greater deliberation in the process of reaching judgment and the writing of opinions. This assumes, of course, that the Court is not failing to hear a significant number of cases that should be heard -- an inquiry to which we now turn.

V.

ANALYSIS OF THE CASES DENIED REVIEW DURING THE 1982 TERM

Members of the New York University Law Review examined all of the "paid" cases denied review during the 1982 Term -- 1860 petitions and jurisdictional statements in all. The Review members examined the denied cases for possible unresolved intercourt conflicts and conflicts with Supreme Court precedents. They did not determine, however, whether any of the other priority docket categories were present among the denied cases. The assumption was that the other priority cases would arise as obligatory appeals and would have been noted by the Court among the cases granted plenary review or accorded summary disposition. Aside from this one exclusion, the Review members directly investigated the claim that the Court's workload prevented it from hearing cases that ought to have been heard during the period studied.

Although we and the members of the *Review* worked closely in applying our criteria, their application of the criteria to particular cases may differ from our own. The Notes accompanying this study discuss unresolved conflicts as well as cases that were difficult to categorize or that simply present interesting issues that were nevertheless not ripe for Supreme Court review. All told, the Notes discuss 47 cases and are organized by subject matter. An analysis of *every* paid case denied review in the 1982 Term is provided in an appendix.

Of the 1860 cases examined, the students found that 13 petitions presented intolerable conflicts that should have been heard under the criteria of this study. The *Review* members determined, however, that 9 of these petitions were properly denied review notwithstanding our case selection criteria because, for example, the case before the Court involved an issue of local procedure or the circuit's position was in line with the majority of circuits and thus the case before the Court did not present an ideal occasion for resolving the conflict. All but one of the 13 petitions involved a three-court conflict. In addition, the students found 7 petitions raising a two-court conflict but without any significant potential for forum-shopping or burden on multi-state actors. Figure V-1 summarizes these findings:

FIGURE V-1
ANALYSIS OF CASES DENIED REVIEW, 1982 TERM

	Number	Percentage (base = 1860)
Priority conflicts (according to Project criteria)	12 */	0.65
3-court conflicts	11	0.59
2-court conflicts	1	0.05
Conflicts that should have been heard during the 1982 Term	4	0.22
Tolerable 2-Court Conflicts (according to Project criteria)	7	0.38
Conflicts with Supreme Court Precedent	0	0.00

*/ Two petitions presented the same conflict.

Whether one chooses the figure of 19 unresolved conflicts or the figure of 12 priority conflicts denied review during the 1982 Term, the Court enjoyed ample capacity to decide these cases, given that 39 of the cases granted review that Term were improvident grants. We recognize that not all cases involve the same claim on the Court's decisional resources, and thus one cannot always assume a one-on-one equivalence between a case denied review and one on the plenary docket. On the other hand, there is no need to assume that the conflicts denied review were so much more difficult than the improvident grants. At the very least, these numbers suggest the need for a reappraisal of the claim that docket incapacity prevents the Court from fulfilling its conflict-resolution responsibility.

VI.

THE CAUSES OF OVERGRANTING

Our study of the Court's docket in the 1982 Term has demonstrated that the Court granted review in a significant number of cases that did not merit its attention (what we have called the improvident grants). Moreover, the Law Review's study has shown that the Court did not fail to hear a significant number of conflict cases that had a claim on its time (what we have called the priority conflicts). Thus, our Article argues that by removing the improvident grants from its docket, the Court would liberate sufficient capacity to add the relatively small number of priority cases that were denied review -- and that, even then, it would maintain a substantial residuum of excess capacity. In short, the Project has demonstrated that the Court presently is "overgranting." In this section of our Article, we seek to identify the causes of overgranting.

The generality and indeterminateness of Supreme Court Rule 17 is a primary cause of the overgranting phemonenon. The failure to develop and articulate manageable yet principled criteria to guide the case selection process makes that process one without limits. This failure permits -- indeed, requires -- subjective criteria, such as individual Justices' jurisprudential agendas, to control the case selection process despite the Justices' and the legal community's recognition that the Court cannot sit as a court of error. Obviously, a Justice believes that cases posing legal questions about which he or she feels strongly are correspondingly important for the nation and for American law. The emphasis on a case's "significance" or "importance" encourages (indeed, compels) individual Justices to press their views with little attention to whether the issues presented actually are sufficiently important to merit review or whether final resolution of the issue is indeed warranted. Pressures towards overgranting are necessarily increased when there is no clear, dominant doctrinal consensus on the Court and Justices therefore press more vigorously for review of cases fitting within their own doctrinal or jurisprudential agendas. Indeed, when it is clear that three Justices feel strongly that a given petition should be reviewed, it is common for a fourth Justice to join them to preserve the Court's collegial atmosphere and good working relations. These tendencies, probably inevitable to some extent, are exacerbated by the absence of detailed and principled criteria for case selection.

The lack of detailed criteria for case selection is not the only cause of overgranting. Certain structural features of the Court's case selection process contribute to the problem. To understand the impact of these structural features, it is necessary to describe briefly the process by which review is granted.

The Justices meet in conferences to discuss the resolution of cases before them and to sift through the petitions for review to select those which will be assigned to the Court's docket. At the major conference in September, before the beginning of each Term, the Justices treat all of the requests for review that have been filed with the Court since the end of the previous Term (ordinarily in late June) and decide which of those cases will receive plenary consideration during the coming term. Throughout the balance of the Term, the Justices meet in periodic -- usually weekly -- conferences to discuss and sift through the petitions that have amassed since each previous conference. By operation of the "Rule of Four," the votes of four Justices are necessary before a case is set for full review.

In 1925, when the Judges' Bill was enacted, the Justices themselves did most of the preparation for the conferences, reviewing all the petitions and records of every case filed with the court, personally preparing a pre-conference memorandum for each case, and discussing every case at conference. By 1947, the Chief Justice circulated a "dead list" of petitions deemed unworthy of review, and the Justices only discussed those petitions not appearing on the "dead list," though a Justice could rescue a case from that list. Presently, the Chief Justice circulates a "discuss list" of those cases which are considered worthy of review, and only those cases are discussed by the Justices at conference; a Justice may add a case to the "discuss list," but if no Justice moves to add a given case to that list, review is denied in that case without discussion.

Further, the Justices no longer prepare individual memoranda for each case, nor do they even receive a memorandum from one of their clerks concerning each case. Now, six of the Justices participate in a "cert pool," in which the Justices "pool" their law clerks for the purpose of reviewing the appeals and petitions for certiorari. The weekly load of petitions is divided among the chambers of the participating Justices.

Each clerk of a participating Justice is assigned an equal share of these petitions, and he or she will prepare a detailed memorandum for each of the cases in his or her portion. This memorandum is then circulated to the chambers of all the Justices participating in the pool.

We believe that the structure of decision-making just described contributes to overgranting in several ways:

First, the petitions examined by the Justices at the weekly conferences are but a small and unrepresentative sample of the Court's total caseload. The Justices make their decisions on case selection without any real sense of how their docket is evolving. The Justices' decisions to grant or to withhold review might turn out differently if they met in conference on a monthly or quarterly basis. For example, when the Justices meet in the major conference each September, they have before them about one-fifth of the cases filed in a year. These cases are presumably representative of those filed throughout the year. Yet, over the last four Terms, the ratio of cases granted at the major conference in September has been significantly lower than that for the rest of the year.8/

Second, the screening process ends with the vote at conference granting review to a given case; there is no "second look" at votes to grant review. Thus, the screening process is only as good as a single discussion at conference (lasting, in total, perhaps 15 minutes) can make it. And, since the pre-conference consideration of a case is necessarily both cursory and individual, it is inevitable that some inappropriate cases will pass through the screen.

Finally, the perception by the Justices that they are overworked may itself contribute to the overgranting problem. When one believes oneself to be overworked, one tends to perform each given task more hastily, with less attention, in a frantic effort to try to keep up with the overall burden. Paradoxically, if a Justice is laboring under a perception of overwork, he or she may decide that, while he or she is unable to give every case the examination it deserves, certain cases seem too important to drop without the careful examination only plenary review can provide. On this view, it is thus better to chance overgranting than to miss a potentially important case.

8/ During the 1979 Term, the ratio of granted cases to denied cases at the September conference was 1 in 20 (22 of 391); for the rest of the year, 1 in 12 (110 of 1385). During the 1980 Term, the ratio was 1 in 23 at the September conference (21 of 458); for the rest of the year, 1 in 11 (146 of 1541). During the 1981 Term, the ratio was 1 in 14 at the September conference (26 of 373); for the rest of the year, 1 in 10 (177 of 1727). During the 1982 Term, the ratio was 1 in 24 at the September conference (16 of 412); for the rest of the year, 1 in 10 (153 of 1480).

VII.

REMEDIAL MISMATCH: THE PROPOSALS FOR A NEW APPELLATE COURT - AND THE CAUSES OF OVERGRANTING

Bills providing for the creation of a new appellate court, variously styled a National Court of Appeals or an Intercircuit Tribunal, are pending before the Senate and the House of Representatives. Each shares a fundamental flaw: the creation of a new layer of courts does nothing to remedy the absence of detailed criteria to guide the case selection process -- and thus does nothing to address the major cause of overgranting. Moreover, the creation of a new layer of courts will not contain the particularized agendas of the Justices, nor will it diminish the willingness of some Justices to join three of their colleagues in granting a case for reasons unconnected with the intrinsic importance of the case itself. Absent a change in internal procedures, even after the creation of a new national appellate court, the Justices will still select the cases they (and the new court) will hear in weekly conferences, and their decision to hear a case will go unreviewed. In short, a new court would not address any of the causes of overgranting delineated in Section VI. Moreover, it is our view that not only would a new court fail to reduce the Court's workload, but also that it would aggravate existing problems and create new ones.

First, the structural relationship between the new court and the Supreme Court may exacerbate the workload problem. Even if the Court decides to refer a case to the new court, the case may work its way back to the Supreme Court after decision by the new court. Because the creation of a new appellate court apparently doubles the possibility of another stage of review after the present courts of appeals, litigants will be more likely to press for further review after a decision of a court of appeals. Further, the increased complexity of the case selection process -- including not merely the judgment whether a case is review-worthy, but whether it should be retained by the Justices or referred to the new court -- not only will increase the work of the Justices but also will create new legal and procedural issues themselves likely to generate considerable additional work for the Supreme Court.

Second, the interpolation of the new court between the present courts of appeals and the Supreme Court may contribute to instability and incoherence in the law. The presence of the new court will necessarily undermine the finality currently inhering in the decisions of the existing courts of appeals, yet its decisions would not be final, because they are subject to ultimate review by the Supreme Court. Thus, because the new court's decisions will be neither final nor authoritative, they will not be a source of coherence in national law.

Third, the new court itself may generate additional work for the Supreme Court. Because it effectively will be a court of exclusive jurisdiction with power to bind all the nation's courts, the Supreme Court will necessarily be compelled to examine its decisions more carefully and to grant review more frequently should the Justices suspect that the lower court's decisions are in error. Further, the judges of the new court will not over time necessarily be ideologically or politically compatible with the Justices; as the Note in the main study on the relationship of the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit illustrates, in the event that the Supreme Court and the new court find themselves at loggerheads, the Supreme Court will be more sparing in its referral of important cases to the new court as well as readier to grant review in cases solely to correct "erroneous" decisions.

Fourth, the membership of the new court will contribute to instability and incoherence in the law. Because of doubts concerning the wisdom of creating a new layer of appellate courts, the new court is to be an experiment to last only for five years. Under all current proposals, the judges of the new court will be selected on a rotating basis from the present judges of the courts of appeals. Unfortunately, the practice of rotating judges likely would produce major doctrinal shifts as one judge is replaced by another (with differing jurisprudential, constitutional, or political views). Though such doctrinal shifts are nothing new to students of the history of the Supreme Court, such shifts at the Supreme Court take place over decades or even generations; the rotation of judges on the new court, however, would accelerate such doctrinal shifts dramatically, rendering unstable the decisions of the new court and the judicial doctrines flowing from those decisions. Thus, the authoritative guidance hoped for from the new court would be compromised -- indeed, the new court could all too easily become a source of doctrinal incoherence, thus creating even more work for the Supreme Court. Even if the new court is not subject to doctrinal incoherence due to the rotation of the judges, the temporary, experimental nature of the new court would work against the creation of institutional identity and habits of collegiality that are necessary to develop a consistent, coherent body of federal law.

VIII.

TAILORING THE REMEDY TO THE PROBLEM

The Project indicates that while the Supreme Court presently may be overburdened -- and the Justices certainly believe that is the case -- there is no need for a major structural change such as the proposed new court. Rather, since much of the problem is traceable to defects in the case selection process, it follows that correction of these defects would do much to address it. Most of the reforms we suggest in this Part could be effected by the Justices themselves; one or two would require Congressional action. Each of the proposals we submit here would enable the Court better to perform its managerial functions and its role as articulator of authoritative and uniform federal law. The fundamental premises of our recommendations and our analysis of others' proposed reforms is that the remedy must be tailored to the problem; too sweeping a remedy not only might not reduce the Supreme Court's workload problem but also might bring other problems in its wake.

A. RECOMMENDATIONS

1. _The Abolition of Mandatory Appellate Jurisdiction_: This proposal has been endorsed by all the Justices and enjoys all but unanimous support from commentators on the overload problem and the proposed new appellate court. Although our study indicates that abolition of mandatory appellate jurisdiction would effect a reduction of no more than 8 percent of its docket, we believe that abolition would free the Court of the chore of passing on each and every appeal and would permit the full control over the shape of its docket necessary to carry out its managerial responsibilities.

2. _The Formulation of New Criteria for Case Selection_: We urge that the Supreme Court give serious consideration to the development of more specific criteria delineating the kinds of cases that are appropriate for Supreme Court review. While we have presented one possible model for such criteria, we believe, however, that our proposed model is a fair indicator of the lines of inquiry the Justices ought to pursue in their efforts to formulate a more coherent and workable guide to case selection. And, it would be valuable if the Justices were not only to develop a new, more definite set of criteria for case selection but in some way -- whether by promulgation as a new Supreme Court Rule replacing or supplementing the present Rule 17 or more indirectly -- to disseminate it among the legal community. The Justices would thus be sending clearer signals to the Supreme Court bar, enabling the legal community to screen out on their own many petitions that are presently filed but that would clearly fail to qualify for review under the articulated criteria and at the same time

forestalling the bar's temptation to read a denial of review as having substantive significance as to the merits of the case denied review.

3. Requiring a Statement of the Basis of the Request for Review Linked to the Court's Criteria: This requirement of a summary presentation of the basis of the petition for review, linked to the Court's criteria, not only would assist the Court in deciding whether to grant review by minimizing the reliance of litigants on prolix petitions and string citations but would also assist the litigants themselves in focusing their argument. For example, claims of intercourt conflict should require a short statement of the issue involved and a list of no more than four courts allegedly in conflict.

4. Requiring Certification that the Case Merits Supreme Court Review: We favor the adoption of a rule analogous to Rule 11 of the Federal Rules of Civil Procedure, which requires a certification that papers filed in civil litigation are not frivolous and permits the imposition of full costs, including the costs of the other party, on the party violating the Rule. An attorney filing a petition should certify that he or she has examined the case selection criteria articulated by the Court and that he or she honestly believes that based on the criteria the petition should be granted. The Court could impose sanctions in cases where it was convinced that the attorney knowingly or negligently filed a frivolous petition.

5. Incorporating a "Second Look" into the Case Selection Process: To keep improvident grants to a minimum, we suggest that the Justices incorporate a "second look" mechanism into the case selection process. At the initial conference, the Justices should vote as they do now on granting or denying review on each petition, but the results of that vote should not be announced. Instead, the petitions receiving at least four votes should be submitted to an independent staff (composed of an independent team of law clerks, attorneys, or senior appellate judges) who would review these decisions against the Justices' previously articulated criteria for case selection to determine whether review is merited. Then the petitions, together with the staff reports on each, would be returned to the Justices for reconsideration and a second vote. If the cases still received at least four votes, review would be granted and the result announced. This process would be more likely to screen possible improvident grants before they are officially announced. In cases where the basis for granting review is solely to use a case as a "vehicle" for the announcement of a major doctrinal shift or innivation, we also propose that the Justices should take a "straw" vote or in some other way

determine whether, if a "vehicle" case is accepted for review, the Justices will actually be able to unite on an opinion authoritatively setting forth clear legal principles. If the Justices' straw vote determines that there is no consensus on the eventual structure or substance of the Court's opinion, then the Justices will have had advance notice that the case should not be granted.

6. Modification of the Court's Schedule: We suggest that the Justices review petitions on a bimonthly rather than on a weekly basis. This change in the case selection process would give the Justices a more accurate overview of the developing docket and of the work of the lower courts, and, by placing each decision to grant or deny review in fuller and more representative context, would also curb the tendencies stimulating the overgranting phenomenon.

7. Facilitation of Further Research through Increased Data Collection: It is important to gather data to enable the legal community to assist the Court in assessing its performance of its assigned functions and to identify further reforms that could alleviate the Court's burden. First, the Court could begin to publish the Justices' votes on decisions to grant or deny review, opening these records to qualified scholars after a given number of years have elapsed from the actual vote. Such information would be useful in discussion of proposals for reform and of the effects of features of the Court's present case selection process such as the Rule of Four or the "cert pool."

8. Use of Transfer and Venue Rules to Avoid Forum-Shopping in Cases of Intercourt Conflicts:

As developed in Professors Estreicher's and Sexton's article, the mere fact that two circuit courts are in conflict presents no pressing reason for Supreme Court intervention unless a party is able to take advantage of the conflict by forum-shopping or unless the conflict stymies the ability of multi-circuit actors to plan their affairs. Much can be done, moreover, to minimize these undesirable features of conflicts while preserving the benefits of percolation -- and, in the process, to reduce significantly the number of conflict cases on the Supreme Court's priority docket.

The most promising approach, in our view, would be for Congress generally to restrict federal venue to the district or circuit where the claim or cause of action arise. Under a restrictive venue regime, parties will know with certainty the law that will govern their affairs. Moreover, they will be unable to bring themselves under a different set of legal rules by forum choice. We recognize that this approach raises difficult questions such as the assignment of a situs to multi-circuit transactions. Special rules may also be needed for cases involving challenges to government rules or decisions of national applicability, where venue might be restricted to the District of Columbia Circuit or to the principal place of business or residence of the challenger. For actions originating at the district court level, provision for transfer of venue for reasons of litigation convenience would be necessary, but by analogy to the rules governing transfer in federal diversity cases, the law of the transferor circuit would apply.

A second approach, discussed in a Note entitled "Using Choice of Law Rules to Make Intercircuit Conflicts Tolerable" would be to preserve existing venue rules, which maximize considerations of litigation ocnvenience, but to stipulate choice of law rules either by legislation or by Supreme Court rule-making. The Note argues that fairly clear-cut, manageable rules can be developed, referring either to the law of the circuit where the claim or cause of action arose or to the law of the circuit of the defendant's residence or principal place of businesss. The Note proposes a set of defendant-based rules and applies them to some of the cases granted review during the 1982 Term.

B. OTHER PROPOSALS

We distinguish the proposals discussed above from those that follow, the adoption of which we would favor only as a last resort against the creation of a new intermediate appellate court. For various reasons, these proposals seem at present to carry with them seeds of greater problems or at least the abandonment of values and practices that are worth the inconvenience to which they may subject the Court.

1. __Modification of the Rule of Four__: Many commentators and at least one Justice have suggested that the Rule of Four be replaced by a Rule of Five. The proposal presents some obvious difficulties respecting the ability of an entrenched majority to foreclose even threshhold consideration of issues of concern to a significant minority of Justices. Our principal objection is that the proposal does nothing to meet the problem of overgranting. Although a "Rule of Five" may increase the reversal rate for cases on the certiorari docket, or conceivably reduce the aggregate number of grants per term, adoption of the proposal would provide no additiona assurance of appropriate case selection.

2. __Giving Nationally Binding Effect To Certain En Banc Circuit Court Decisions.__ Justice White and several other commentators have proposed a

novel way of addressing intercircuit conflicts. If, after a panel of one circuit decides a legal issue, a panel of a second circuit is faced with the same issue but resolves it in a contrary way, the circuit court in which the second panel is located must convene en banc to consider the issue. The en banc decision thereby promulgated then becomes a nationally binding rule on that issue which can be overturned only by a decision of the Supreme Court.

While this suggestion is at first an attractive way to dispose of intercircuit conflicts, we do not support it for several reasons. First and foremost, this proposal disregards the value and usefulness of percolation. Frequently the legal issue in question is susceptible of more than two mirror-image resolutions; abandonment of percolation is abandonment of the possibility of a third, intermediate resolution of the given issue. Second, its adoption would mean that a circuit with little experience and knowledge in an area of law might overrule a circuit with widely acknowledged expertise in that area of law (for example, the Second Circuit on commercial law or the D.C. Circuit on administrative law). And, third, this proposal shares many of the difficulties that would beset the NCA. Because the en banc decision would be authoritative only if not reversed or later overturned by the Supreme Court, litigants still would have incentive to press their claims in the hope of securing a truly final and thus truly authoritative Supreme Court decision in their favor.

In any event, this proposal, like that for alteration or replacement of the Rule of Four, should not be adopted immediately. It would be better to implement less drastic reforms, such as those described above, and to determine whether they effectively reduce the Court's workload before adopting this remedy. Still, if forced to choose between this proposed remedy and the NCA, we think the choice is clear. No matter what its faults, the "binding en banc decision" remedy does not bring with it the severe systemic problems and destabilizing effects that would flow from the creation of the NCA.

3. Referring Trivial Conflicts To Disinterested Circuits For Binding En Banc Decision: There is a variant of the "binding en banc decision" proposal that perhaps deserves some more discussion. It has been urged that many of the conflicts that the Court does hear and resolve are not really worthy of the Court's attention because they involve relatively narrow issues of statutory construction in areas of federal law that are not of general interest. There are, of course, reasons to be skeptical of a trivial conflict contention, for the significance or difficulty of an issue may not be apparent yet the fact that conflict among three or more

courts are in conflict suggests that the issue is at least significant, controversial, and difficult within its particular subject matter sphere. We certainly invite the reader to peruse the appendix entries on the granted cases and attempt to identify the supposed trivial conflicts. Assume arguendo that there are ten such conflicts each year that the Court, heeding our criteria of case selection, would hear and resolve even though all that is needed is a definitive resolution by some tribunal, which need not be the Court. If so, there might be utility in a statute authorizing the Court, perhaps on a vote of six or seven Justices, to refer a trivial conflict to a circuit, chosen at random among the courts that have not considered the issue. That circuit would be delegated the authority to issue a definitive resolution of the issue that would be binding on the nation, with the opportunity to seek discretionary review with the Supreme Court. This type of procedure might conceivably free up docket capacity yet ensure the benefits of lower-court percolation, and at the same time not involve the creation of a new tribunal whose only ostensible role would be the handling of parochial, relatively insignificant cases.

Aside from the question whether there are in fact a significant number of such trivial conflicts, the Project at least raises a doubt whether there is a pressing need to free up additional docket capacity, when the cases comprising the priority docket during the 1982 Term accounted for only 44.84% of the overall grants, and one in five decisions to grant review were improvidently made. We further note that any referral function makes more complex and time-consuming the case selection process; and we doubt whether the Justices will be able to agree readily on which of the conflicts may be deemed to be of the trivial variety. There is also force to the point that Professor Hellman, among others, has made -- that the Court benefits institutionally from the occasional "easy" case in which the Justices can reach agreement without a proliferation of separate opinions or rancor.

4. The Creation Of Specialized Appellate Courts: Some commentators have suggested the creation of specialized appellate courts, on the model of the Court of Appeals for the Federal Circuit. By siphoning off given classes of cases, these courts would eliminate needless intercircuit conflicts and thereby decrease the need for Supreme Court review in those areas. A specialized court for tax appeals is the most frequently mentioned possibility in this area. This proposal, too, is open to question. Critics of this proposal argue that a judge familiar with the whole range of legal questions confronting a federal court is more likely

to decide cases more soundly and creatively than a "specialist" judge; further, a court which deals exclusively with a governmental agency, as a court of tax appeals would deal with the IRS or a court of administrative appeals would deal with the various federal administrative agencies, might become too deferential to the views of the relevant agency, or too deferential to the views of the specialized bar in question. Moreover, whenever an intermediate appellate court is given exclusive jurisdiction, the benefits of percolation are sacrificed and pressure is created on the Court to intervene with some regularity in order to provide some supervision of -- and some check on -- the specialized court's work.

Courts of exclusive jurisdiction, if they are to be established, should be confined to areas where the vindication of values and principles of controversial significance are less important than the creation of certainty and predictability in the law. Patent litigation is one such area, and thus assignment of such cases to the Court of Appeals for the Federal Circuit was eminently wise. We should not expect litigants in such cases to press regularly for Supreme Court review, or the Justices to feel strongly any temptation to intervene. Tax litigation may be another such area. To avoid the "captive court" problem outlined above, such cases should also be assigned to the Court of Appeals for the Federal Circuit, so as to expand the breadth of the subject-matter responsibilities of that court, and, correspondingly, the breadth of training and perspective of the personnel of that court.

We do not in this paper urge the creation of additional specialized tribunals. Even in the tax area, the case has yet to be made with convincing clarity that such a change is needed. We would certainly recommend the elimination of forum-shopping in tax cases, perhaps by eliminating the role of the Claims Court and codifying the acquiescence policy of the Tax Court. But the Law Review study does not identify any significant number of conflicts in the tax area that are left unresolved by the Court; indeed, the student Note on the tax petitions found that only one case presented even a colorable claim of intercourt conflict. Moreover, we would urge that Congress halt creation of a court of tax appeals, at least until it has had a chance to study the first years of the new Court of Appeals for the Federal Circuit.

Senator **East**. Thank you, Professor Sexton.

I find much merit in what you are saying. When you speak, which you have, of the Court developing standards, criteria, suggesting that there is some way you could measure the worthiness of a case—easier said than done, of course—I wonder if you could elaborate a bit on that for me.

Dr. **Sexton**. There is absolutely no question it is easier said than done. Rule 17 now speaks of only two kinds of cases: conflicts and "important" cases.

Of course everybody agrees the Supreme Court should hear "important" cases. The problem is defining the important cases.

We have attempted to do this. Our vision of the Court is basically a managerial one, spelled out in the NYU Law Review in 60 pages. I will try to do it in six sentences here.

In essence we reject the notion, as everybody does at least verbally, that the Court is there to correct error. We place confidence in the regularity of the subordinate actors in the judicial system, State and Federal—the State supreme courts and the lower Federal judiciary. We have tried to develop criteria which would be keys, structural keys, that indicate to the Supreme Court, as manager, when the subordinates have gone awry.

The obvious key is conflict. When you have a conflict in the lower courts, then it is clear that the subordinate actors have gone awry. Conflict has been treated like a "dirty word" in some of the remarks today. I want to say that structurally, our judicial system sees conflict as a good thing. The flip side of conflict is percolation, and there is a certain degree of conflict that is good, and we want to encourage it—to a certain extent. Therefore, in our criteria, we do not suggest that the Supreme Court intervene before three courts have considered the issue, and are in conflict with each other. At that point, the Supreme Court should intervene to resolve that conflict; but otherwise, it should not be involved.

That is one example of the many criteria that we developed. Others of the criteria, also structural keys, play off some of the appellate categories. So we would say, for example, that another structural key would be if a Federal court invalidated a State statute. In such a case, there is an issue of vertical federalism, and we think that that merits the intervention of the Supreme Court of the United States. I will elaborate more if you want, but I think you now have the flavor of what we tried to say in developing our vision.

We are not saying it is the only vision. We are just saying that the advocates of an ITC have not come up with a vision of the Court. They just assert, from the raw numbers, that there is a workload problem.

Senator **East**. I gather then, as a former Clerk the Court, I gather you are sympathetic then to Justice Stevens' contention that it is an illusion to think that the creation of this intercircuit panel will in fact reduce, in any substantial way, the avalanche of cases, as the Chief Justice puts it, on the Supreme Court.

I guess another question I am asking—and I realize that someone might say, well, when things are bad, you have to do something. Of course I would say not always something. If the something does not in fact materially alter or change, then one might question the virtue of doing it.

Granted, you can say, well, there is a 5-year "sunset" provision in this law. Of course we know that nothing has a more permanent life than a new government entity, and I think once the panel is instituted, it will undoubtedly become a permanent feature of the Federal court system, and that is a very serious proposition. I do not think it ought to be undertaken lightly, but it is a very fundamental alteration in the American judicial system.

I think all would have to concede that, and I guess the question I raise is, if the benefit is marginal at best, one might have some reservations about doing it.

But again I am rambling a bit here. Getting back to your service as a Clerk on the Court, as you at least experienced in that role, you do not see the intercircuit panel as substantially, or in any substantial way, lessening the workload on the Court?

In short, it is not—theoretically, it may sound good and it may accord to the theory of "better do something than nothing," but as you see it, pragmatically speaking, practically speaking, would it in fact make a substantial contribution to reducing that workload?

Dr. SEXTON. I do not want to extrapolate too much from 1 year's experience at the Court. As a member of academe, however, one tends to associate with a lot of people who have been at the Court, and I think it is fair to say two things, based upon my experience, which I understand to be an almost universally shared experience.

First, every Clerk experienced Friday afternoon, after conference, his or her Justice coming back to chambers, as for example, the Chief Justice did in our chambers, and saying, "Gosh, you should have seen the case they granted today. It just doesn't belong here." That happens all the time.

People who watch the Court scratch their heads 30 or 40 times a year—just about the number we came up with—and say, "Why is that case there?"

Cases where, for example, there is no question that strikes anybody as particularly important, and cases involving issues on which all the circuits are in agreement. Somebody has just reached out because he or she believes that the decision below is wrong, and they are upset about it. So that is No. 1, and that goes to the issue of whether or not there is sufficient capacity, and hence, the need for an ICT.

Second, and directly to your question is, the effect of an ICT on the life of a law clerk at the Court, would be to make the job of making a recommendation to the Justice on the case more difficult. Further, I believe it would make the Justice's decision more difficult because it increases the options. That is as much as I can extrapolate from my experience at the Court.

Senator EAST. Thank you. Senator Heflin.

Senator HEFLIN. It is running rather late, and I would like to bring this to an end. I would like to submit some written questions to Professor Sexton and keep the record open.

I would like to compliment the chairman of the subcommittee and his staff for an excellent group of witnesses, and I think that the record is an excellent one. The pros and cons have been presented by excellent witnesses in an effective manner, and I think a meaningful record has been developed.

Senator EAST. Thank you, Senator Heflin, and again, Professor Sexton, we appreciate your being with us, as well as all of the other panelists, and if there are no further questions, or comments—Senator Heflin?

Senator HEFLIN. No.

Senator EAST. We will stand adjourned. How does that sound?

Senator HEFLIN. That is fine.

Senator EAST. Without objection, we stand adjourned.

[Whereupon, at 1:07 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

Statement by
ERWIN N. GRISWOLD
of Jones, Day, Reavis & Pogue, Attorneys,
Washington, D.C., before the Subcommittee
on Courts of the Senate Committee on the
Judiciary relating to S. 704, the
"Intercircuit Panel of the United States Act"
Wednesday, October 9, 1985

I am glad to have the opportunity to make this statement in support of S. 704, which would establish an intercircuit panel subordinate to the Supreme Court. Such a panel would make decisions with national validity, subject only to possible -- but ordinarily -- unlikely review by the Supreme Court.

I

The underlying problem has been under active discussion now for more than fifteen years, and it is time that we did something about it. I would myself like to go even further than S. 704 does, but it represents a real step forward. By its terms it is experimental. It is limited in its duration to five years. If it works well, it can then be expanded and extended. If it should prove to be unsuccessful, then it can be terminated and we can look for another way to deal with the problem.

All thoughtful students of the problem are agreed that the Supreme Court decides all the cases that it can -- and, indeed, probably more than it should. Yet, the Supreme Court cannot possibly decide all of the cases which merit a decision on a national basis. Congress has long recognized this fact, and has many times taken action to keep the Court from being overwhelmed. Ninety-five years ago, in 1890, Congress established the United States Courts of Appeals. More than sixty years ago, in 1925, Congress narrowed the obligatory jurisdiction of the Supreme Court, and provided that a considerable proportion of decisions in the courts of appeals and in State supreme courts should be reviewable only at the discretion of the Supreme Court, through what we call the certiorari jurisdiction. In recent years, Congress has carried this process close to a conclusion, by eliminating most of what remained of the Supreme Court's obligatory jurisdiction on appeal.

The result has been to provide well warranted protection for the Supreme Court. It is no longer overwhelmed, nor is it in danger of being overwhelmed, for it holds itself the key to its front door. With very few exceptions, the jurisdiction of the Supreme Court is now wholly discretionary. The Court can take as many cases as it feels it has the time and resources to decide. It need not take any more.

But this protection of the Supreme Court, necessary and vital as it is, has been obtained at a great price. The time has come when we should give careful attention to the situation which has resulted from the inevitable restrictions on the jurisdiction of the Supreme Court. The present jurisdictional arrangement, with one undoubted Supreme Court, acting on a discretionary basis, leads to a curious paradox. It is true that we have "one supreme Court" constitutionally and legally established. But, for practical purposes, we have sixty-five or more supreme courts in this country in addition to the Supreme Court of the United States. These consist of the Supreme Courts of the States, the Supreme Court of Puerto Rico, the District of Columbia Court of Appeals, the twelve United States Courts of Appeals, the Court of Appeals for the

Federal Circuit, and the Court of Military Appeals. All of these courts can make final decisions in cases before them, reviewed by the Supreme Court only through its discretionary certiorari, which, out of necessity, can be exercised only rarely.

There are two important consequences of this:

1. The first is that though we have one Supreme Court, the fact is that we have a system which provides, ultimately, only discretionary justice. And, discretionary justice is by no means compatible with "Equal Justice Under Law." It has quite a bit in it which is reminiscent of Harun al Rashid sitting under a tree. No reasons are given for the denial of certiorari. It is impossible to state with precision the grounds on which certiorari is granted or withheld. Despite misapprehensions which are sometimes held, the denial of certiorari is not a decision of the legal questions involved in the case. Anyone who examines a number of the cases which come before the Supreme Court on petitions for certiorari will find that the Court frequently denies its discretionary review in cases which it would reverse if it had the time to hear them on the merits.

This system, though inevitable, and though it provides well warranted protection for the Supreme Court, it not wholly sound. It has in it a considerable element of what Dean Pound called "justice without law." This is troubling. It probably cannot be eliminated in a country as large and litigious as ours. But it can be reduced through developments such as those provided by S. 704, now before the Subcommittee.

2. The second defect of the present system is that we have inadequate appellate capacity on a national basis. No decision of any state supreme court, or of the federal courts of appeals is, binding throughout the land, except to some extent the Court of Appeals for the Federal Circuit, and the

somewhat exotic Emergency Court of Appeals. Though the number of questions which has been decided is large, the decisions which establish the law of the land are those of the Supreme Court of the United States, and they are few.

The result is a kind of chaos, so great that we would be startled by it, I am sure, if we had not grown up with it, and become accustomed to it. Though a question of federal statutory or constitutional law may have been decided in half a dozen state supreme courts, it is still quite open in all the other state supreme courts. Indeed, no one can really rely on the decisions of the courts where the question has been decided, since, sometime in the future, the Supreme Court of the United States may review a case from that state, or from another state, and decide it the other way.

The situation is even worse with respect to the United States courts of appeals, where questions often remain unsettled for many years, until, somehow or other, the issue is able to crack the Supreme Court's certiorari barrier which, ordinarily, is hard to do.

II

In our well warranted concern for the courts, we tend to forget that most of the law in this country is administered in law offices, private and governmental. The judicial system would surely collapse if this were not so. Under our present system, though, the process of administration is made extremely difficult. A careful lawyer cannot advise his client that the law is one way or another. About the most he can say is that there are three decisions in the courts of appeals which go this way, and two that go that way. In addition, there are decisions in two other circuits which are not wholly clear. It is true that one of the cases against us is in this circuit. However, I cannot advise you to proceed according to that decision, because this is an area where the Supreme Court may grant certiorari, perhaps years hence, and there is no way to predict what way the Supreme Court would decide the case.

The question is equally difficult for government lawyers. They cannot rely on the decisions of the several courts of appeals any more than the private lawyers can. The result is continuing uncertainty, encouragement to litigation, and a premium on continued litigation. I am sure that the burden on the courts in this country would be considerably reduced if we only had a system which would enable lawyers, both private and public, and judges of the lower courts, to know somewhat more definitely than is now the case what the law is.

This is especially true in areas where there are a large number of recurring questions, no one of which is of great importance by itself, and most of which are not worthy of review by the Supreme Court of the United States.

There are a number of fields in which such questions are concentrated. One of these is the federal tax field. Another is that of patents and trademarks. It seems likely that the same has been developing in the area of environmental law. The same may be true of antitrust.

I can illustrate the problem, by referring to a case which I argued in the Supreme Court when I was a government officer. This is Cartwright v. United States, 411 U.S. 546, decided in 1973. The question involved there was the value to be put upon shares in mutual funds for the purpose of determining the federal estate tax. Should they be at the high, or retail price, including loading, at which they can be bought; or, should they be valued at the lower price, without loading, for which they can be redeemed? This is a question which must have arisen tens of thousands of times, and it must have been involved in many thousands of conferences between executors and revenue agents. Yet it took more than ten years to get this issue decided. The Treasury issued a regulation fixing the high value. And this was approved by several of the lower courts. Yet, eventually a conflict of decisions developed, and the Supreme Court finally decided that the lower value was the correct one. We should not have had to wait more than ten years for a decision from the Supreme Court to establish a rule on this matter which was binding on a nationwide basis. Indeed, it is hard to feel satisfied that the question was one which the Supreme Court should ever have had to concern itself with at all. The problem arises because our present system provides no nationwide answer for any question until the Supreme Court has decided it -- and the Supreme Court can, in the nature of things, decide very few cases.

III

The time has come, I feel sure, when we must provide more appellate capacity, and this can be readily accomplished, and with little risk, by the Intercircuit Panel which would be created by S. 704. The fact is that we badly need a better organized appellate capacity in this country. The dockets of the United States Courts of Appeals are nearly overwhelmed. But we will not solve the real problem, I feel sure, by merely providing more regional appellate courts and appellate judges.

The point I wish to make was well put in a letter which I received some time ago from an old friend in a distant state. I want to adopt his words. This is what he wrote to me.

> Now that Circuit Judges are multiplying like rabbits, and the litigation curve rises faster than the inflation rate, it becomes increasingly clear that the existing federal judicial system has become unworkable. How avoid inter-circuit conflicts when there are twenty-six judges in a single circuit? How predict a result when every one of these twenty-six has a different outlook? I used to say that, except in truly open-and-shut cases, I could guarantee a win provided only that I was allowed to select the panel.

At this point, I would repeat a thought I have tried to express before. Under the present system, there is no certainty -- there can be no certainty -- in appellate decisions. The way many cases will come out is a lottery, depending entirely on the makeup of the panel which hears the case. This is not only unsound as between the parties. Even more serious is the fact that it makes planning and predictability almost impossible.

My friend continued with these words:

> Something must give, and I feel even more strongly now than I did some years ago that there must be a new tier between what we now have and the Supreme Court . . .
>
> These new courts will work only if they are composed of a fixed number of judges, and if they are completely closed to visiting judges of every description, else they too will suffer from the "panelitis" that makes Las Vegas slot machines far more certain in their operation than the U.S. Courts of Appeals as presently constituted.

These are strong words, but I think that they are well warranted. At the very least, we should start the process of organizing our courts in such a way that the uncertainty may be reduced. This can be done by expanding the national appellate capacity, and S. 704, if adopted, would be a strong and useful step in that direction.

IV

Under S. 704, the Supreme Court would have no more burden than it has now. Indeed, it could cut down on the number of cases it hears and decides itself, if it chose to do so. Yet it could nearly double the nationally binding appellate capacity of the country by simply granting review in up to twice as many cases, as it does now, and assigning half of them to the Intercircuit Panel. Some of these would be cases in which there is a conflict, or near conflict, between circuits, thus providing substantial relief for that nagging problem.

But of fully equal importance would be the opportunity for definitive decision of new questions of statutory construction, or practice, where it can be readily foreseen that the question will be recurring, and that the system for administering justice can be made more effective if these questions can receive early definitive decision so that government lawyers and private practitioners can learn without too much delay what they should do and how they can advise their clients.

It may be said that is is just a fourth tier of courts, and that it will only add to the complexity of the system. I do not believe that is the case. The cases assigned to the Intercircuit Panel will be important cases, but they will not present the basic and fundamental cases which now go to the Supreme Court, and ought to go to the Supreme Court. The Supreme Court will continue to hear and decide most constitutional questions. The Intercircuit Panel will resolve conflicts which arise in the ordinary run of cases, and decide questions of statutory construction and common law which are the grist of general practice.

The Supreme Court will have power to review the decisions of the Intercircuit Panel -- since it is our one Supreme Court, under the Constitution. But it will rarely exercise that power, since the Intercircuit Panel will be made up of experienced judges, and its decisions, having nationwide validity, and dealing with important but subordinate questions, will rarely require or be worthy of Supreme Court review.

In the long run I would like to have a permanent court with the powers provided in S. 704 for the Intercircuit Panel. But that can wait. We can see how S. 704 works out, and then do what seems wise. My own judgment is that S. 704 would be a definite improvement over our present situation, and I urge the Subcommitee to act favorably on it.

THE INTER-CIRCUIT TRIBUNAL

STATEMENT BY THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK BY ROBERT B. MCKAY, PRESIDENT, AND BY THE COMMITTEE ON FEDERAL COURTS

We have lived almost 200 years under a constitution which provides for only "one supreme Court" (Article III) - that is, one court with the power and responsibility to review the decisions of all the lower federal courts and all the state courts and to revise their decisions if necessary. S. 704 is a radical departure from this constitutional regime. It is radical because it creates a second court, the Inter-circuit Tribunal of the United States Courts of Appeals, which, together with the Supreme Court, is given the power to review and bind every court in the nation, both federal and state, on questions of transcendent importance. Such a court, moreover, will lack institutional character; its decisions will be made by a Panel of nine circuit judges on leave from their other duties. In the initial period, some judges will serve terms of five years, some of three years, and some of two. Thereafter, all judges will serve terms of three years.

Whether or not any court except the "one supreme Court" referred to in Article III of the Constitution can be given such powers - a matter which is not free of doubt - we should not even give serious consideration to such fundamental changes unless we are persuaded that we face problems both extraordinarily severe and incapable of solution by less radical measures.

Although it is true that there appears to be a consensus that the Supreme Court faces a "calendar crisis", there has not yet evolved a consensus about what has caused the crisis. Is it the growing number of petitions for certiorari? The mandatory jurisdiction of the court? Inter-circuit conflicts? The growing number of dissenting, concurring and plurality opinions in the Supreme Court itself? Mistakes by the Court concerning which cases to review? Each of these has been suggested by one or more students of the problem as the cause of the "crisis." Other students of the problem have questioned the premises on which action is proposed. For example, it has been suggested that the inter-circuit problem has been much exaggerated. Until we locate precisely the nature and cause of the so-called "calendar crisis" we will not know how to solve it in the least disruptive way. We should not be "experimenting" with a constitutional system that has served us so well for 200 years, at least until we have concluded that there is simply no other way to meet the problem.

The proposal for the Inter-circuit Tribunal embodied in S. 704 is seriously flawed for many other reasons as well. It will cause considerable additional delay in the resolution of legal disputes. It will require the litigants to expend substantial additional monies and effort. It is also likely that the existence of the Inter-circuit Tribunal will be counterproductive - that is, it will increase, not decrease, the burdens of both the Supreme Court and the lower federal and state courts. Finally, the Inter-circuit Tribunal is likely to have a corrosive effect upon the workings of the federal courts of appeals and the highest courts of the states.

Under S. 704 a new level of review is added to a system already too cumbersome. In a typical federal civil case, for example, the parties have already been through lengthy pre-trial discovery and motion proceedings, a trial, an appeal to one of the courts of appeals, a petition for re-hearing or re-hearing en banc. Now, under S. 704, there would be: (a) a petition to the Supreme Court and a decision by that court whether to hear the case or whether to refer it to the Inter-circuit Tribunal; (b) if the case is referred, there will be a separate decision by the Inter-circuit Tribunal whether to hear the case on the merits, unless the Supreme Court directs that the case be decided; (c) if that court decides to hear the case, there will be further delay for briefing, argument and decision; (d) having come this far, the litigants are not likely to give up and there will be a further petition to the Supreme Court, followed by another decision by that court whether to hear the case, and (e) if the Supreme Court decides to hear the case, there will be additional briefs, argument and the writing of a decision by the Supreme Court. This is all to replace the present system of a petition to the Supreme Court and, in the cases which are heard, a second stage of briefs, argument and decision.

All the while the litigants are paying legal fees. The need for additional briefs, addressed both to the particular court (the Supreme Court or the Inter-circuit Tribunal) and the particular question (whether to exercise jurisdiction or how to decide the merits) will add greatly to the costs of taking a case to final resolution. Conceivably, a litigant would have to bear such new costs as are entailed in a petition seeking (or opposing) review in the Inter-circuit Tribunal, a brief (or briefs) on the merits before the Inter-circuit Tribunal, a petition for re-hearing in the Inter-circuit Tribunal, and a new petition for a writ of certiorari in the Supreme Court following action by the Inter-circuit Tribunal.

The costs of litigation are already much too high.

Any proposal which adds to these costs bears a heavy burden of justification. The benefits must be demonstrable and substantial. In this case, we do not believe the benefits claimed for the proposal will in fact be realized. Indeed, we think the proposal will increase rather than decrease the burdens upon the courts of the nation - including the Supreme Court.

Under S. 704, the Supreme Court will have several new time-consuming and difficult tasks. The already difficult decision whether to grant or deny a petition for a writ of certiorari will be further complicated because the Court will now have several other options - to refer the case to the Inter-circuit Tribunal with a direction that the case be decided or to refer the case without such a direction. Apparently, the legislation contemplates that first the justices would decide, under the "rule of four" whether to grant certiorari. Then, there would be another vote to determine whether five justices wished to refer the case to the Inter-circuit Tribunal. For each justice, the initial vote on the petition for a writ of certiorari would thus be complicated by his or her assessment whether the case should be heard by the Supreme Court or should instead be referred to the Inter-circuit Tribunal. A justice who believes that a case is important enough to be heard by the Inter-circuit Tribunal but not, initially, by the Supreme Court would face a difficult decision on how to vote on the petition for a writ of certiorari. That justice may vote to grant certiorari in order to refer the case to the Inter-circuit Tribunal only to find that a fifth vote cannot be gathered for that disposition. Presumably, in that event, the case would be heard by the Supreme Court.

S. 704 could also encourage more petitions for review by the Supreme Court. Litigants realize that under the present system there is little chance of having an unfavorable decision reviewed and reversed by the Supreme Court. This knowledge no doubt restrains some litigants, though perhaps not enough, from petitioning the court for review. Under S. 704, the chances of having an unfavorable decision reviewed and reversed would increase substantially. This perception may also increase litigants' willingness to spend the money necessary to seek further review.

There are also strong reasons to believe that many cases referred to the Inter-circuit Tribunal would find their way back to the Supreme Court. Under the present system, the justices could deny certiorari even though they believed the decision below to be erroneous because that decision would bind only one state or one federal circuit. A decision by the Inter-circuit Tribunal, however, binds every court in the nation. Therefore, after the Supreme Court has referred a case to the Inter-circuit Tribunal, it is less likely that four justices would allow an erroneous decision, which binds the nation, to stand without further review by the Supreme Court.

S. 704 would add burdens to the lower courts as well. The nine judges of the Inter-circuit Tribunal and the four alternates would be taken from among those already sitting in the courts of appeals. Those courts face their own serious problems caused by too many cases and not enough judges. Already, these courts have adopted severe procedures (such as limitations on oral argument and summary disposition of cases) in attempts to meet the challenge of their own "calendar crises". Further depletion of these courts would, we believe, be very unwise.

S. 704 would also add considerable uncertainty to our legal system; and uncertainty almost invariably leads to more litigation. First, there would be uncertainty concerning whether, under Article III, the Inter-circuit Tribunal could constitutionally bind all the courts of the nation - and specifically those of the fifty states. Second, under S. 704, the Inter-circuit Tribunal will be composed of judges, each of whom, after the initial period, would serve for only three years. The lack of institutional identity of a court composed like this will increase the likelihood of conflicts and inconsistencies in the cases decided by that court. This is a court, it must be remembered, that has the power to bind the nation. Conflicts lead to confusion, and confusion leads to more litigation.

Finally, we believe that the existence of the Inter-circuit Tribunal will corrode the esteem in which the public and litigants must hold the federal courts of appeals and the highest state courts if our legal system is to survive. Under our present system, the federal courts of appeals and the highest state courts are the courts of last resort except in the most extraordinary cases - those which profoundly affect the entire nation. That the Supreme Court has the capacity to review so few cases reinforces this perception. Even though the number of litigants seeking review in the Supreme Court has been increasing, still the vast majority end their quest for justice at a lower level.

This perception (that the federal courts of appeals and the highest courts of the states are the courts of last resort in almost all cases) is important for many reasons. First, if the litigants begin to see the highest state courts or the federal courts of appeals simply as stations on the way to the Supreme Court, a crushing burden will be added to that court. Equally important, final authority carries with it grave responsibility. One reason that our federal courts of appeals and our highest state courts are so good is that the judges sitting on those courts understand that their word is, almost always, final. This understanding must add to the care with which the judges perform their duties. The Inter-circuit Tribunal would have the capacity to review many more cases. The existence of the Inter-circuit Tribunal would, to that extent, corrode both the perception and the reality of final authority for the federal courts of appeals and the highest state courts. It would, we believe, thereby do a significant disservice to our legal system.

October 7, 1985

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1985 OCT -2 PM 6 52

September 25, 1985

Senator John P. East, Chairman
Senate Subcommittee on Courts
U.S. Senate
Washington, DC 20515

Dear Senator East:

As a member of the Eleventh Circuit Court of Appeals Lawyer Advisory Committee, I write in support of S.704, the Intercircuit Panel of the United States Act.

One of the most important obligations of the judicial system to the public is the establishment of a clear and consistent body of law which can be relied upon in the conduct of their affairs. This Bill seeks to solve a failing in that obligation for which we are all responsible.

The public in general, and those of us who deal with these issues on a more regular basis, can live with decisional law with which we do not agree, because we know that the issues resulting in the decision were thoroughly litigated, argued and considered in our courts. A continuing conflict in decisional law between and among the federal circuits, however, is very difficult to live with because it frustrates the public's desire to know what the law is, and in the vast majority of instances, to abide by it.

The Intercircuit Panel is a modest proposal to attempt to solve this problem. It has a five year sunset provision so that it can be reviewed and not perpetuated unless it is working.

I urge your favorable consideration of this Bill and prompt action to attempt to solve this problem.

Sincerely,

Dean Bunch

Dean Bunch

DB:jlc

CHAMBERS OF
WALTER J. CUMMINGS
CHIEF JUDGE
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

October 1, 1985

Honorable John P. East
Chairman
Subcommittee on Courts
United States Senate
Washington, D.C. 20510

Dear Senator East:

In reply to your letter of September 27, I and the other members of this Court are strongly opposed to any Intercircuit Tribunal. I agree fully with the views expressed last year to the Committee on the Judiciary or your Subcommittee on Courts by Judge Henry Friendly and Chief Judge William Feinberg, both of the United States Court of Appeals for the Second Circuit.

The Supreme Court can readily control its caseload by letting correct decisions of courts of appeals be final instead of reviewing them. It is a ridiculous waste of judicial time for the Supreme Court to review cases from the courts of appeals, even if important, when they are correctly decided.

Although two of the Justices feel differently, the Supreme Court should also not review unimportant cases from lower courts even if incorrectly decided. Of course, Congress should help the Supreme Court too by changing the law with respect to appeals to the Supreme Court by providing that all cases going to the Supreme Court must go by petition for certiorari, thus giving that Court even more control over its docket.

In the last few years, the Supreme Court has taken an overload of cases involving searches when the courts of appeals are clearly capable of handling those matters by case-by-case decisions.

S. 704 would not save the Supreme Court time because it would have to decide what cases must go to the Intercircuit Tribunal and must then later decide whether to review the work of that court.

Finally, most judges worth their salt would not care to sit on the Intercircuit Tribunal which would have only the cases the Supreme Court considered not worth its while and still would be subject to review by that Court.

As you have doubtless heard, members of the Supreme Court are very divided on the question. You may wish to put this letter in the Record since any live testimony would only be corroborating the views of the distinguished opponents of the measure. This Court would appreciate your doing everything in your power to bury S. 704 indefinitely.

With kind regards,

Walter J. Cummings

Walter J. Cummings
Chief Judge of the
Seventh Circuit

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WADE H. MCCREE, JR.
LEWIS M. SIMES PROFESSOR OF LAW

1985 OCT -7 AM 4: 18

October 4, 1985

The Honorable John P. East, Senator
U.S. Senate Building
Washington, D.C. 20510

Dear Senator East:

Thank you for the invitation to comment on S. 704 which is being considered by the Subcommittee on Courts of the U.S. Senate Committee on the Judiciary. I support the proposed bill for the reasons set forth in a lecture I delivered at the University of Cincinnati Law School in 1983.

I enclose a copy of the transcript of my remarks. The pertinent language begins on page 990 and concludes on page 993.

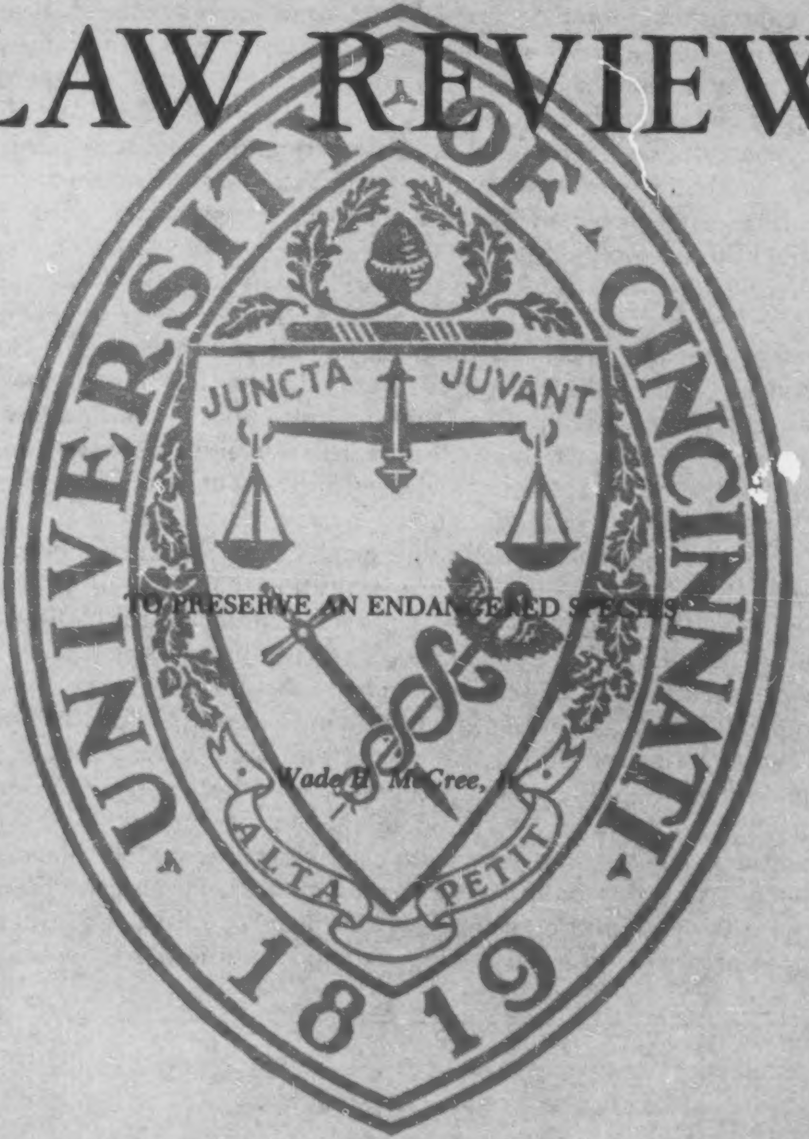
Sincerely yours,

Wade H. McCree, Jr.
Wade H. McCree, Jr.

Enclosure

WHMC:cy

UNIVERSITY OF CINCINNATI LAW REVIEW



TO PRESERVE AN ENDANGERED SPECIES

Wade H. McCree, Jr.

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TO PRESERVE AN ENDANGERED SPECIES*

*Wade H. McCree, Jr.***

I.

The recent heightened awareness of the vulnerability of our ecosystem and its inhabitants has resulted in the enactment of several legislative measures for the purification and protection of the environment. Special attention has been paid to animal and plant species that appear endangered, principally by human thoughtlessness, and those organisms found to be threatened with extinction have been accorded special attention to help them avoid the fate of the dodo bird. Some mistakes have been made, as in the case of the snail darter, a fish once thought to live only in the free-flowing waters of the Little Tennessee River which was scheduled for impoundment behind the Tellico Dam constructed by the Tennessee Valley Authority. After the United States Court of Appeals for the Sixth Circuit and the Supreme Court of the United States had stayed the closing of the sluice gates, the Congress excepted the project from the restrictions of the Endangered Species Act.[1] Fortunately for the snail darter and its conservationist friends, the fish was found to abound in the waters of the Arkansas River and in other swift-running streams of the region.

The *rara avis* about which I will speak in these lectures is not bird, beast, fish or fowl, but a political institution that I can assure you is unique and does not exist anywhere except in its natural habitat, the nation's capital. I believe that I also will be able to demonstrate that its preservation is necessary for the continuation of our form of government. I refer, of course, to the Supreme Court of the United States.

Next Sunday, on May 1, Americans will observe Law Day, a day upon which the citizenry is encouraged to reflect about the central role that the rule of law plays in the life of our nation. Foreign observers of our polity, as well as native commentators, have pronounced law our national secular religion. They observe that we regard the Constitution as our holy scripture or Bible, the justices of our Supreme Court as our high priesthood and the courthouses about the nation as our temples, with the holiest of holies housed in the Supreme Court in Washington. We could labor the metaphor by referring to judges of inferior courts as the regular clergy and to the lawyers who assist with the rituals as their acolytes. If this comparison is overstated, why do the officers of the judicial branch don robes or other special vestments when they publicly perform their duties?

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* This Article is a transcript of the Robert S. Marx lectures delivered by Professor McCree at the University of Cincinnati College of Law on April 28-29, 1983.

** Lewis M. Simes Professor of Law, University of Michigan; Solicitor General of the United States, 1977-1982; United States Circuit Judge, United States Court of Appeals for the Sixth Circuit, 1966-1977.

[1] 16 U.S.C. §§ 1531-1543 (1982).

It appears quite certain that this role that the Court and the Constitution have come to play in the life of our nation was neither planned nor foreseen when article III of our basic document was drafted and ratified.

Article III provides first that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[2] It continues:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . . to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—[and] between Citizens of different States.[3]

All that was written about its original and appellate jurisdiction is that "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases . . . the supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make."[4]

Before we leave this cursory reading of the Constitution, we should turn also to article VI, providing that

> [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[5]

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[2] U.S. Const. art. III, § 1.

[3] U.S. Const. art. III, § 2, cl. 1.

[4] U.S. Const. art. III, § 2, cl. 2.

[5] U.S. Const. art. VI, cl. 2.

Although the Constitution provided that judges appointed pursuant to article III should hold office during good behavior and that their compensation could not be diminished,[6] it left to the Congress to determine the number of justices—a number that the Congress could increase or decrease if it were so minded.

One year after the adoption of the new Constitution, the Judiciary Act of 1789 established the jurisdiction of the Supreme Court and a system of inferior federal courts. President Washington lost little time in appointing the first justices, in the number set by the Congress. However, the position of justice could not have been regarded highly, because in February, 1790, when the original justices met in New York City to organize the Court, only four of the six appointees attended. Robert H. Harrison declined appointment, preferring to serve as the Chancellor of Maryland, and John Rutledge, after not having attended a session for three years, resigned to serve as Chief Justice of South Carolina.

Despite this inauspicious beginning, the Court, principally under the inspired leadership and creative statesmanship of John Marshall, established its independence and asserted and exercized the power to decide whether acts of Congress, the executive or the sovereign states exceeded or conflicted with the powers granted by the Constitution.

It is not the purpose of this lecture to chronicle all or even most of the feats of judicial craftsmanship by which Chief Justice Marshall and his colleagues established the primacy of the Court. I recommend to persons interested in this fascinating period of our history Professor Robert G. McCloskey's book, *The American Supreme Court.*[7] I will limit myself to a brief account of a familiar case, *Marbury v. Madison.*[8]

In 1800, the Federalists, having held the presidency since the beginning of the Republic, were defeated at the polls by the Republicans; and before Jefferson could be inaugurated on March 4, 1801, the defeated President Adams appointed the famous "midnight judges" in the hope that they might stem the feared Republican tide. Although the appointments were rushed through confirmation in the Senate, some commissions, including that of William Marbury, who had been appointed Justice of the Peace in the District of Columbia, had not been delivered by Inauguration Day. By an amazing coincidence,

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[6] U.S. CONST. art. III, § 1.

[7] R. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960).

[8] 5 U.S. (1 Cranch) 137 (1803).

Adams's Secretary of State at fault was John Marshall, who had just been appointed Chief Justice. When Thomas Jefferson's Secretary of State, James Madison, refused to deliver Marbury's commission, Marbury filed an original action in the Supreme Court for a writ of mandamus to compel Madison to deliver it.

The Court was confronted by a dilemma. If the Court should order Madison to deliver the commissions and Madison should refuse, President Jefferson might defy the Court by not requiring obedience to its order. On the other hand, if the Court ruled against Marbury, who clearly was entitled to receive his commission, it would indicate a judicial weakness when high level politics were involved. Marshall resolved this problem by holding that, despite the obvious merit of Marbury's claim, so much of the Judiciary Act of 1789 that purported to grant jurisdiction to the Supreme Court to hear this petition as an original, and not an appellate, matter was in violation of the Constitution because this action was not one of those enumerated in article III, where the Supreme Court's original jurisdiction was limited to certain matters.[9] The unanimous Court held that Congress could not enlarge the original jurisdiction of the Court beyond the constitutional grant, although it could, by constitutional authority, regulate the Court's appellate jurisdiction. Accordingly, the action was dismissed.

Chief Justice Marshall thus avoided a dangerous challenge to the Court's independence and prestige. He avoided a confrontation with the President and also established the right of the Supreme Court to review the constitutionality of acts of Congress. Of course, there are governments where the legislatures—parliaments—regularly decide whether their own acts are "constitutional," but since *Marbury v. Madison* it has been clear that in our nation it is the province of the judicial branch to say what the law is.

Our *rara avis* was by this time fully fledged and became strong enough to endure even the inevitable wartime subordination of law and justice that accompanied the Civil War, which was in part brought on by the Court's unfortunate decision in the *Dred Scott* case.[10] Also, in the immediate post-war period, the Court accepted and survived the withdrawal by Congress of its appellate jurisdiction in habeas corpus even though it already had heard argument in the targeted appeal and had the matter under advisement awaiting decision. This episode in *Ex parte McCardle*[11] likely would not be repeated today should Congress enact some of the pending legislation to withdraw the Supreme Court's jurisdiction to review certain state and federal laws.

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[9] *See supra* text accompanying note 4.

[10] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (result reversed by the Civil War Amendments).

I mention *Ex parte McCardle* because it was decided at the beginning of reconstruction, not the most glorious period in the history of the Court, and because it permits us to observe that in the past four decades the Court finally has recognized the true meaning of the thirteenth, fourteenth and fifteenth amendments and, in its ~~inimical~~ way, has poured contemporary meaning into the constitutional language of another era. inimitable

So much for my discussion, brief and superficial as it is, of the political institution that is endangered today. The peril comes not from persons who would destroy it; the Court has too much strength to succumb to attacks from without. Just as it survived President Andrew Jackson's lack of support in the executive removal of native Americans from their homelands, and the attempted Court packing during the New Deal, so it will survive the critics who oppose desegregation, abortion and the ban against school prayers.

The danger that the Court faces today is institutional and results from the volume of litigation that threatens to engulf it. The remedy may take one or more of several forms. We will proceed to examine the need for change and some of the proposals.

II.

The docket problems of the Supreme Court primarily concern its appellate jurisdiction. The Court controls its original jurisdiction by Court rule that requires leave to file and permits the Court, by denying a motion for leave in appropriate cases, to exclude the matters outside its jurisdiction.

The Congress, on the other hand, largely controls the Court's appellate jurisdiction by statute, as permitted by article III. And it is in its appellate jurisdiction that the Supreme Court has made its great contribution to our system of government by interpreting the Constitution as a living document that permits change with order through a discipline of justifying departure from precedent by rigorous constitutional analysis and documentation.

We should also be aware of another aspect of the Court's appellate jurisdiction. The Supreme Court is not a court of errors—that is, a reviewing tribunal that corrects mistakes made in a trial court. Its function is far more cosmic and includes determining the proper relationship between the sovereign states and the national government, and between the branches of the federal government. The Court is required to decide just how far a majoritarian action can extend without transgressing a constitutional limitation. The Court is a special kind of lawmaker in addition to being an interpreter of the meaning of statutes and regulations.

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[11] 74 U.S. (7 Wall.) 506 (1869).

Before the Civil War, the Congress, which, by the Judiciary Act of 1789, granted diversity jurisdiction to the lower federal courts, had given them federal question jurisdiction only in a small number of well-defined instances. When, in the Judiciary Act of 1875, Congress gave the federal courts a general grant of federal question jurisdiction, the number of cases flowing into the Supreme Court threatened its capacity because its appellate jurisdiction was mandatory. Some relief came in 1891 when Congress, in the Evarts Act, created the circuit courts of appeal and provided for discretionary Supreme Court review by certiorari of most final decisions of the new appellate courts.[12]

Relief was short-lived, unfortunately, and when increased filings in the 1920's again threatened the Court, Chief Justice William Howard Taft lobbied effectively for the "Judges' Bill" that restricted appeal as of right and increased the Court's certiorari jurisdiction to give it more control of its docket.[13]

The only other significant change in the Court's jurisdiction came in 1976 when the Congress repealed, except in reapportionment cases and a few other limited areas which include cases under the Civil Rights Act of 1964, the requirement of a three-judge district court—with direct appeal to the Supreme Court—in injunction actions to stay the operation of state statutes.[14] It also repealed the requirement of a three-judge district court to review Interstate Commerce Commission final orders.

But the docket pressures on the Court continued, and two widely publicized studies of the problem occurred. The first was conducted in 1971 by a distinguished committee chaired by Professor Paul Freund of Harvard Law School. In addition to recommending the elimination of all obligatory appellate jurisdiction, it proposed the creation of a new national court of appeals consisting of seven judges drawn from the ranks of existing circuit judges on a rotating basis. This court would screen certiorari petitions addressed to the Supreme Court and would have the power to deny those petitions found to be without merit. It would pass on to the Supreme Court for its consideration those petitions, estimated at about five hundred annually, deemed to have merit. Cases involving a conflict among circuits not deemed worthy of Supreme Court review would be decided on the merits by the new tribunal, and its decisions would not be reviewable by the Supreme Court. This proposal provoked considerable discussion, but it was not supported by any persons or groups with the power to effect adoption.

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[12] Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

[13] Act of Feb. 13, 1925, ch. 229, 43 Stat. 936.

[14] 28 U.S.C. § 2284(a) (1976) (as amended by Act of Aug. 12, 1976, Pub. L. No. 94-381, § 3, 90 Stat. 1119).

Shortly thereafter the Congress established a national commission on revision of the federal court appellate system.[15] It was given two charges: to review the boundaries of existing circuits and to suggest realignment where needed; and to study the structure of the appellate system and to recommend changes. The commission was chaired by Senator Hruska of Nebraska.

With respect to its second charge, the Hruska Commission recommended the establishment of a new national court of appeals, but its proposal differed in many respects from the Freund design. The Hruska new court, consisting of seven article III judges, would hear and decide cases referred to it by the Supreme Court, or transferred to it by a regional court of appeals in the case of a circuit conflict or of an important question requiring prompt national resolution. It would have discretion to reject proposed transfers from circuit courts, but would be required to accept referrals from the Supreme Court. Like the Freund report, the Hruska proposal stimulated comment but not adoption.

The pressure on the Supreme Court has not lessened. The expectation that the creation in 1982 of the United States Court of Appeals for the Federal Circuit, the result of a merger of the Court of Claims and the Court of Customs and Patent Appeals, would help was not fully realized when efforts to give it exclusive jurisdiction of Internal Revenue appeals failed.

Still, the Court needs help and, for the first time since 1925, a number of its justices have spoken out on the subject. Justice Stevens at an American Judicature Society Annual Meeting called for the creation of an intermediate screening entity to consider certiorari petitions. Justice White has suggested that the first en banc decision of a circuit court bind all other circuits as to the issues considered, thus eliminating intercircuit divisions. Justice O'Connor has proposed granting jurisdiction to the new Federal Circuit to hear all tax cases and possibly administrative law appeals.

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[15] *The Circuit Court Judgeship, Bill: Hearing on S. 2991 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 1 (1974).

The Chief Justice, in his annual report on the state of the judiciary at the February 6, 1983 meeting of the American Bar Association at New Orleans, proposed the following plan to reduce the Supreme Court calendar to about one hundred argued cases and signed opinions a year, a number thought to be an appropriate limit by Justice Frankfurter, Professor Henry Hart and other students of the Court. Pending the results of a study to be made by a tripartite commission of the highest order, a temporary panel of the Federal Circuit would be established. This temporary panel, limited to a five-year existence, would be attached to that court for administrative purposes and would have special, narrow jurisdiction to decide all intercircuit conflicts.

There is precedent for such a temporary panel in the experiments of the temporary Emergency Court of Appeals, the multi-district litigation panel and the United States Foreign Intelligence Surveillance Court. Such a panel would not require a new structure or new staff in any substantial number, and the judges would be drawn from existing judges of the courts of appeal. This temporary court could demonstrate the feasibility of an intermediate court and permit the commission to come forward with a long-term solution.

I believe that the Chief Justice has a plan that makes good legal sense, good common sense and good political sense, and it could save our endangered species from an untimely demise.

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October 7, 1985

Senator John P. East
Chairman, Subcommittee on Courts
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator East:

I appreciate your invitation to comment on the bill to establish an Intercircuit Panel.

The subject is one to which I have given a good deal of thought. I began to specialize in the Supreme Court while in the Solicitor General's Office from 1941 to 1954, the last four years as first assistant or acting Solicitor General. The first edition of Stern and Gressman, Supreme Court Practice, appeared in 1950; the sixth edition is now at the printer. I was a member of the Freund Committee which made the initial study of the Court's present problem in 1972. In 1975 I testified before the Commission on Revision of the Federal Court Appellate System in support of a proposal very much like that in S.704. I also was a member of the Advisory Committee that first drafted the Federal Rules of Appellate Procedure and have compared the means adopted by the various states (as well as the United States) to deal with the appellate overload problem in my book, Appellate Practice in the United States (1981).

In my opinion, S.704, which permits the Supreme Court to transfer cases--presumably those not quite qualifying for review by it--to an intermediate branch of the court of appeals, takes advantage of the criticisms directed at the prior proposals and retains their best features. Indeed, it comes close to what I suggested in 1975. The proposal is simple to administer and may point the way to helping solve two pressing problems. Experience under it should demonstrate whether it should be permanently retained.

I shall deal separately with the effects of the bill upon the Supreme Court's workload and on the nation's need for authoritative, controlling decisions in more cases than any single body of men can decide. These are, of course, interrelated.

(1) The Supreme Court's Workload.

Your Committee is, of course, aware that the number of cases filed with the Supreme Court each year has expanded from approximately 1,000 in 1940 and 1,200 in 1950 to over 4,200 in recent years. During the earlier years, approximately 150 cases, or roughly 15 percent, were accepted for oral argument. The number accepted has remained about the same, though with variations from year to year, but the percentage taken has decreased to an average of about 5 percent overall, or 7 percent for the non-in forma pauperis petitions. These figures would increase somewhat if cases decided on the merits without argument are included.

The heaviest part of a Justice's job is deciding cases on the merits, which entails reading the briefs, hearing arguments, thinking and conferring, and writing opinions. Consideration must also be given to each of the 4,200 cases at the preliminary stage when the Justices determine whether certiorari is to be granted or denied, or the case otherwise summarily disposed of. Many of these cases take little time--but disposing of almost 90 per week is an overhanging responsibility.

Almost all of the Justices have expressed concern about the workload, about the ability of any Justice to devote intelligent attention to four times as many cases as their predecessors. To reduce the number of cases heard on the merits by 30 to 50 per year would, to a large extent, alleviate the Court's workload problem.

(2) Public Need for Authoritative Decisions.

The Justices seem to agree that about 150 cases per year is all that they can reasonably be expected to accord plenary treatment. But the 150 cases they select are only a minute proportion of the cases decided by the courts of appeals, not to mention the state appellate courts, and, as indicated above, are now only a very small proportion of those which the Court is asked to review. That proportion has diminished as the numbers of appellate judges and decisions in the courts below have all increased tremendously.

Over the years the Supreme Court has generally managed to hold the line at about 150 argued cases. This necessarily means that it has been more strict in determining which cases it will accept for review. Until the 1950s it was generally assumed that the Court would always grant certiorari whenever there was a conflict within the courts of appeals. Now it is well known that the Court frequently denies certiorari despite the existence of an unquestioned conflict. A conflict must now, to some extent, be accompanied by a showing of importance if the Supreme Court is to resolve it.

The standard of importance has also necessarily become more strict. The test cannot be merely whether a large number of persons will be affected or how important the case seems in any objective sense. The test must be whether the case comes within the group of 150 or so cases which the Court can accept. If there are 150 other cases which the Justices deem more important, a case will not be reviewed.

As far as we know, the Court does not grant review on any such mathematical basis. But it must be keeping in mind the number of cases it is accepting for review. It seems clear that there are many other cases which would and should be reviewed if the Court could possibly handle them. In Justice Blackmun's words:

> "Some of us here worry about the cases that we 'barely' do not take, namely, those that almost assuredly would have been taken twenty years ago."

Chief Justice Burger has stated that:

> "It is not a healthy situation when cases deserving of authoritative resolution must remain unresolved. . . ."

There is no reason to believe that, as the number of cases filed gets larger, the proportion which are of substantial importance or which conflict with other cases drastically diminishes. That just does not make sense.

I have stated elsewhere that there is need for an authoritative national resolution not only of the most important cases, but of those which may be said to be of "intermediate" national importance. That now seems to be an understatement; the test really is whether a case can make the top 150. My own judgment--and, of course, that also cannot be verified mathematically--is that many more cases than that out of the thousands decided by the courts of appeals, as well as the state cases presenting federal questions, call for a national determination.

I am aware that an object of the bill is to provide a court which can decide conflicts on issues which may not be important enough to make the top 150, particularly on matters of statutory construction where legislative modification of judicial rulings is feasible. I agree that such cases are appropriate for submission to the new panel. But the jurisdiction of the new court and the Supreme Court's authority to refer cases to it should not be restricted to conflicts, and it is not in S.704. Cases of importance which cannot make the top 150 for other reasons would also be subject to referral.

How many cases of this sort the Supreme Court will assign the Panel cannot be foretold. Whether such an assignment would reduce the Supreme Court's workload would depend upon whether the Court would otherwise have reviewed the case itself. If it would have, the assignment will be beneficial in that it relieves the Court of a part of its burden. If the case would not otherwise have been accepted for review, the assignment enables the issue presented to be nationally determined, which should also be beneficial.

There is also some room for disagreement as to what kind of conflict should be enough to call for Supreme Court review. It is now generally said that the conflict must be "direct"; the cases must be absolutely indistinguishable. Disagreement as to principle, or in similar but not identical situations, is not thought to be enough. But differences among courts of appeals as to principle will often lead to lack of uniformity in the law which, in the public interest, ought to be resolved if at all possible without waiting many years. This is particularly unfair to the many persons whose claims do not involve enough money to permit them to seek correction through the appellate court system.

(3) Creation of an Additional "Tier" in the Appellate Structure Would Not Be Unduly Burdensome.

The creation of an intermediate appellate court between the Supreme Court and the courts of appeals has often been criticized on the grounds that it will add a new tier to the federal appellate structure which will be both costly and time-consuming. This might result if, after transferring a case to the new court, the Supreme Court would subsequently review that court's ruling, as all agree it must have a right to do. But the Supreme Court would presumably transfer only the cases which it thought not important enough for it to decide. That would mean that, in most instances, the Supreme Court would not take a case back on a second petition for certiorari.

Although few people seem to know it, experience in the States supports this view. In Iowa and Oklahoma, all appeals are taken to the state Supreme Court, which then determines what cases should be transferred to the court of appeals. Idaho and Hawaii have recently adopted the same system. The Massachusetts Supreme Judicial Court examines appeals to the court of appeals before argument in that court, and, at that stage, decides which are important enough for it to hear; it then transfers those cases to its own docket. In those states only a relatively few cases decided by the court of appeals are subsequently granted review by the state supreme court.

Of course, as stated by Professor Meador in testifying before a House subcommittee in 1983, "The volume and nature of this appellate forum's business can be determined only after an experimental run." I add that the same will be true as to whether any appreciable portion of the new court's cases will subsequently be accepted for review by the Supreme Court.

A number of states--Pennsylvania, California, Kansas, Wisconsin, Massachusetts, New Jersey, New Mexico, Oklahoma and Washington--seek to lessen the burden of review by an additional appellate court by not requiring, or in some states even allowing, without special permission, additional briefs to be filed in the higher court, which receives copies of the briefs filed below. (See Stern, Appellate Practice in the United States (1981), Section 7.3(b), pp. 214-219, and Section 1.10, pp. 30-33). This practice could be followed if and when the Supreme Court grants review of decisions of the Intercircuit Panel, though it probably would be advisable to allow counsel to file at least a supplemental brief if counsel deemed that desirable. Such a rule would also enable the case to be argued in the Supreme Court shortly after certiorari was granted, thereby greatly reducing the delay caused by review in an additional court.

(4) Particular Provisions.

The provisions in S.704 for the appointment and composition of the Intercircuit Panel are, in my opinion, superior to those in earlier bills. I agree that the Panel should sit en banc, so that its decisions would have continuity and be predictable by the Bar. Selecting one or two judges from each circuit would have taken too many judges and burdened some circuits more than others. Appointment by the Supreme Court should be the best way of obtaining distinguished circuit judges. The explicit statement that the Panel's decisions will be binding on all courts except the Supreme Court would enable the Panel to accomplish its basic purposes.

I have some question as to the advisability of transferring the function of deciding whether to grant or deny certiorari to the new Panel along with the function of deciding the case on the merits unless the Supreme Court limits the Panel to the latter. Perhaps the most criticized feature of the Freund Committee Report was its transfer to the proposed new court of appeals of the function of initially passing upon petitions for certiorari. Although I joined in that Report, I was impressed by the magnitude of the opposition on this point, which urged both that the Court should not give up any part of its right to decide what cases it should hear and that doing so would not save much of its time. S.704 seems to call for the Court to decide case by case whether it or the new Panel would exercise the certiorari function. That would require the Court to learn something about each case, and would probably take as much or almost as much time as would be needed to determine whether certiorari should be granted. The bill seems to contemplate that in the normal course, if the Court assigns the case to the Panel, the Panel would then have to go through the same mental processes. I think it would be more reasonable for the Supreme Court to decide in the first place whether certiorari should be granted. That would mean that the time which the Court would need to spend at the certiorari stage would not be diminished. But for the reasons stated by the opponents of the Freund Report, including Justice Brennan, that is not regarded as contributing substantially to the Court's burden.

The bill does not read as if the Court was empowered to assign classes of petitions for certiorari to the Panel. That, in my opinion, might do no harm. But it would run counter to a primary ground of opposition to the Freund Report's recommendation, some of which came from within the Court and might produce friction among the Justices.

A principal benefit to be derived from the bill comes from the Court's power to ensure that nationally controlling decisions could be made in some important cases which the Supreme Court would not otherwise decide. This would benefit the nation without adding to the Supreme Court's workload. I would let it go at that, and not also authorize the Supreme Court to authorize the Panel to determine whether a case should be reviewed by either court.

Respectfully submitted,

Robt L Stern

Robert L. Stern

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October 17, 1985

Honorable John P. East
Chairman, Subcommittee on Courts
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator East:

RE: S. 704, The Intercircuit Panel of the United States Act

I greatly regret that absence from my Harvard Law School office delayed my response to your letter of September 22 beyond the date on which the subcommittee would consider the above bill. I nonetheless appreciate your thoughtfulness in writing to me and wish that I could have been of more assistance.

I lean to the view that the enactment of S. 704, perhaps with one modification, would be wise. The ever increasing flood of litigation appears to be creating a Supreme Court docket that cannot be managed without significant changes. While an outside cannot be sure, the burden of the work on each Justice seems seems likely to vary inversely with the length of his or her service upon the Court. For the first five or six years the burden must be much greater than it is after the Justice has become familiar with the principal areas of Supreme Court litigation. I am inclined to think that the development of law would be improved and the burden of the work load would be more manageable if the Justices would reduce the number of independent opinions, but that is not something that can be accomplished by legislation and seems unlikely to happen.

The enactment of S. 704 with a fixed cutoff after five years might provide considerable new knowledge about ways of dealing with a problem that will become unmanageable under the present court structure even if it is not so already.

My only significant criticism of the present bill is that I think it unwise to give the Court the power and responsibility of determining case by case, the stage at which it will refer cases to the new Intercircuit Panel and to prescribe whether the Panel shall or shall not render a decision on the merits. I fear that leaving the matter so open-ended will simply provide new subjects for disagreement among the Justices. Also, it seems to me that the chief value of an Intercircuit Panel would be to provide authoritative determinations upon questions on which the separate Circuits seem to entertain a variety of opinions but which are not sufficiently important to command time for full briefs and oral argument in the Supreme Court. I would propose redrafting the bill so as to provide for referral and decision on the merits in cases that the Supreme Court determines to fall within that category.

May I say once again that I regret the delay and any seeming but surely unintended discourtesy.

Sincerely,

Archibald Cox

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

November 4, 1985

Honorable John P. East
Chairman
Subcommittee on Courts
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator East:

In the past, Professor Milton Handler's views as a witness and respected author on the workload problem of the federal courts have been most helpful to Congress. His recent article What to Do With the Supreme Court's Burgeoning Calendars, 5 Cardozo L. Rev. 249 (1984), is the most original and balanced thinking on the subject that I have found in the literature on this subject. I believe it would be useful reading for our colleagues in the consideration of S. 704, the Intercircuit Panel bill, and I therefore suggest it be included in the record of your recent hearings on this legislation.

Thank you for your consideration.

Sincerely,

Edward M. Kennedy

Enclosure

CARDOZO
LAW REVIEW

With Compliments of
Milton Handler

WHAT TO DO WITH THE SUPREME COURT'S BURGEONING CALENDARS?

By
Milton Handler

VOLUME 5 **WINTER 1984** **NUMBER 2**

WHAT TO DO WITH THE SUPREME COURT'S BURGEONING CALENDARS?

Milton Handler[*]

INTRODUCTION

During the past year, various Justices of the United States Supreme Court have spoken out publicly on the escalating caseload confronting the federal judiciary system. Many of the Justices have expressed concern over the proliferation of appeals at the Supreme Court and circuit court levels and the rising tide of filings in the district courts.[1] Many have agreed that this tidal wave of litigation poses a serious threat to the maintenance of the high quality that has been the hallmark of the federal system.[2] At least one member of the Court has gone so far as to say that the federal courts may be literally on the verge of collapse.[3]

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[*] Professor Emeritus of Law, Columbia University; A.B., 1924, L.L.B., 1926, Columbia University; L.L.D. (honoris causa), 1965, Hebrew University; Senior Partner, Kaye, Scholer, Fierman, Hays & Handler. Grateful acknowledgment is made to the assistance of Robert Chernoff in the preparation of this Article.

[1] See infra notes 7-9, 14, 23, 30, 39, 42 and accompanying text (remarks of Justices White, Stevens, Brennan, Burger, Powell and Rehnquist); see also Flaherty, Supreme Court Agrees: Work Load Is Crushing, Nat'l L.J., Nov. 15, 1982, at 3, col. 1 (analysis of the Justices' public discussions of suggestions to diminish the Supreme Court workload). Justice White has written:

> There are now between 4,000 and 4,500 petitions for certiorari and statements of jurisdiction or appeal filed in the court each term. Their flow, like the Mississippi, is unceasing. Each week adds another eighty or ninety or one hundred to our docket, and they must be disposed of with regularity.
>
> There will be over 1,000 items on the first conference list when we reconvene in the fall.

White, The Work of the Supreme Court: A Nuts and Bolts Description, 54 N.Y. St. B.J. 346, 349 (1982).

In a recent speech at New York University, Judge Irving R. Kaufman of the Second Circuit Court of Appeals noted the increasing caseload that faces today's courts, stating that "[c]aseloads in both the state and federal courts have increased at fantastic rates in recent years. We are confronted with a tidal wave of litigation, which threatens to swamp both judges and courts in a seemingly endless sea of cases." Remarks of Judge Irving R. Kaufman on Accepting New York University's Presidential Citation from President John Brademas, in New York City, at 4 (1982) (available in Cardozo Law School Library).

[2] See infra notes 21, 31-32, 40, 42-45 and accompanying text (remarks of Justices Stevens, Burger, Powell, Rehnquist and Marshall).

[3] Burger, Today's Challenge: Improving the Administration of Justice, N.Y. St. B.J., February 1983, at 7, 12 (1983) (remarks of Chief Justice Burger at the Arthur T. Vanderbilt Dinner sponsored by New York University and the Institute of Judicial Administration, Nov. 18, 1982); see also Burger, Year-End Report on the Judiciary 12 (1982) ("The excessive caseload burden of the federal courts is nowhere more evident than in the Supreme Court. In 1981, 350

Three aspects of the problem at the Supreme Court level will be discussed in this Article: (1) the alleviation of the burdens of the screening process; (2) the reduction of the volume of cases on the argument calender to a number that the Court can manage comfortably while maintaining the high quality expected of the highest court of the land; and (3) the steps that can be taken by the Court itself, without legislation or any structural changes in the judicial system, if it will only recognize, collectively, as have at least two of the Justices, that it is itself part of the problem. In my discussion, I shall comment on the various proposals of the Justices and commentators that merit consideration by the courts, the executive and legislative branches and the bar. This Article will not address those proposals that are unsupported by a consensus, and that, regardless of their possible merits, are unlikely to be put into effect in time to avert the catastrophe which all fear may overcome us.[4]

I. THE JUSTICES' RECOMMENDATIONS

There is agreement among the Justices as well as among the lower court judges that some radical measures must be adopted before the end of the century if the federal judicial system is not to disintegrate. There is disagreement, however, as to the most effective means of remedying the present "calendar crisis," especially with respect to the Supreme Court itself. Some of the Justices have recommended somewhat modest remedial measures that would probably inspire little, if any, controversy if put into effect.[5] Others have suggested more far-reaching proposals.[6]

In an address before the Antitrust Section of the American Bar Association, Justice White pointed out that the number of filings on the Supreme Court's docket and the number of published opinions have risen dramatically since the 1970's.[7] In addition, the quality of

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more cases were filed with the Supreme Court than in the previous year.") [hereinafter cited as Burger Year-End Report]; Burger, Annual Report on the State of the Judiciary, 69 A.B.A. J. 442, 443 (1983) ("If we project the experience of the past 14 years over the next 14 years, the Supreme Court may well have 7,000 to 9,000 filings annually . . . . Does anyone think nine Justices could cope with 9,000 filings?") [hereinafter cited as Burger, Annual Report].

[4] See, e.g., Coleman, The Supreme Court of the United States: Managing Its Caseload to Achieve its Constitutional Purposes, 52 Fordham L. Rev. 1 (1983). But see No Need for a Sub-Supreme Court, N.Y. Times, Feb. 9, 1983, at A30, col. 1.

[5] See, e.g., infra notes 27-29, 41 and accompanying text (proposals of Justices Brennan and Powell).

[6] See, e.g., infra notes 20-22 and accompanying text (proposal of Justice Stevens).

[7] According to Justice White, there were 4,400 new filings during the Supreme Court's last Term. Address by Justice White before the American Bar Association, in San Francisco, at 15 (Aug. 1982) (available in Cardozo Law School Library) [hereinafter cited as White Address] reprinted in altered form in White, Challenges for the U.S. Supreme Court and the Bar:

cases has changed considerably over the years, with a greater number of "hard cases" coming to the Court than ever before.[8] "[W]hat this [burgeoning case load] means," said Justice White, "is that we shall not be current in our work; cases will be ready for argument but we shall not be ready for them. This is something new and disturbing for us . . . ."[9]

Justice White urged the bench, the bar and others concerned with the well-being of the federal court system to give serious consideration to what should be done. He recommended renewed study of at least four proposals: first, the establishment of a National Court of Appeals—a specialized appellate court to which the Supreme Court would refer cases warranting further consideration, but which the Supreme Court itself has no time to hear;[10] second, the division of the

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Contemporary Reflections, 51 Antitrust L.J. 275, 280 (1982). The Court granted review in 210 of these cases—26 more than the prior Term and 56 more than the Term before that. By way of explanation as to why the Court had agreed to take on so many cases for one term, he stated, "there were just too many petitions for certiorari that we could not conscientiously deny." White, supra, at 278. According to the Justice, the number of filings increased during the 1960's and 1970's at a rate of about five percent per year, doubling in 20 years. It then leveled off in the late 1970's, but is now rising again. Id. at 277. For more than 20 years prior to 1970, the Supreme Court had written about 100 opinions per term, in addition to a small number of per curiam opinions in argued cases.

> That number crept up during the 1970s. But it has become apparent that it can creep no more in that direction. As a rule of thumb, the Court should not be expected to produce more than 150 opinions per term in argued cases, including per curiam opinions in such cases.

Id.

[8] "There have always been hard cases on the Court's docket, but it should be no surprise that as filings increase, so do the number of hard cases that must be reviewed." White, supra note 7, at 280; see also infra note 31 (statement of Chief Justice Burger).

[9] White, supra note 7, at 278-79.

[10] The decisions of the National Court of Appeals would still be subject to certiorari review by the Supreme Court, although proponents of this new type of court have said that only rarely would the Supreme Court grant such review. Id. at 281. Justice White expressed the belief that a National Court of Appeals would not disturb the jurisdiction of the other courts of appeals, nor delay the resolution of cases substantially beyond that which would be required if the Supreme Court were to decide the cases itself. Although there would be an additional 150 to 200 cases in which the decisions of the courts of appeals would not be final, and the same number of opinions that the lower courts would have to follow as precedent, this would be "no more than what would be necessary to ensure that the federal law is not being enforced in substantially different ways in different parts of the country." Id.

Justice White did not support the National Court of Appeals proposal explicitly, but merely discussed its pros and cons. The Hruska Commission, after extensive hearings, proposed the creation of such a court. Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195, 199-200, 208-09 (1975) [hereinafter cited as Hruska Report]. The Freund Commission sought to relieve the Supreme Court by delegating the screening process to the new court. Federal Judicial Center, Report of the Study Group on the Case Load of the Supreme Court 18-24, 47 (1972) [hereinafter cited as Freund Report].

workload between two separate Supreme Courts;[11] third, the institution of a procedure by which a court of appeals would be required to decide a case en banc before differing with another court of appeals, in which event its decision would become the nationwide rule;[12] and fourth, the creation of new, specialized courts of appeals, designed to hear appeals from all the district courts of the country in certain specialized areas of the law.[13]

In his address before the American Judicature Society, Justice Stevens placed part of the blame for the enlarged calendars on the Court itself.[14] Too often, he noted, the Court has exhibited "an unfortunate lack of judicial restraint,"[15] granting certiorari in many cases not warranting review.[16]

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[11] One approach might be to delegate statutory questions to one Supreme Court and constitutional questions to the other. Another approach might be to limit one of the Courts to resolving criminal matters, while allowing the other Court to handle civil cases. White, supra note 7, at 281; see also Burger, Annual Report, supra note 3, at 446 ("Still another alternative advanced would be to create not one but two intermediate courts of appeals, one for criminal cases and one for civil cases.").

[12] White Address, supra note 7, at 17.

[13] For example, the United States Court of Appeals for the Federal Circuit, recently created by the merger of the Court of Customs and Patent Appeals and the Court of Claims, hears all appeals from district courts in cases arising under the patent laws. 35 U.S.C.A. § 144 (West Supp. 1983). Specialized courts such as this can bypass the regular courts of appeals and eliminate the possibility of conflicts that normally require Supreme Court resolution. White, supra note 7, at 281; see infra note 84 and accompanying text.

[14] In his address, Justice Stevens stated:

> The Supreme Court is now processing more litigation than ever before. The Court is granting more petitions for certiorari; litigants whose petitions are granted next fall may have to wait a full year before their cases are argued. The Court is issuing more pages of written material; opinions for the Court are longer and more numerous and separate opinions are becoming the norm instead of the exception. The Court is deciding more cases on the merits without the benefit of full briefing and argument, using the currently fashionable technique of explaining its reasons in a "per curiam" opinion—a document generally written for the Court by an anonymous member of its ever increasing administrative staff.
>
> More and more frequently, after a case has been fully argued, the Court finds it appropriate to dismiss the writ of certiorari without making any decision on the merits because it belatedly learns that certiorari was improvidently granted. As is true in so many courts throughout the country, the heavy flow of litigation is having a more serious impact on the administration of justice than is generally recognized.

Stevens, Some Thoughts on Judicial Restraints, 66 Judicature 177, 178 (1982) (footnotes omitted) (address before the American Judicature Society, August 6, 1982).

[15] Id. at 180.

[16] In light of the recent tendency of the Supreme Court to grant review to so many petitions, Justice Stevens questioned whether the court was engaging in "unnecessary lawmaking":

> When it is necessary to announce a new proposition of law in order to decide an actual case or controversy between adversary litigants, a court has a duty to exercise its lawmaking power. But when no such necessity is present, in my opinion there is an equally strong duty to avoid unnecessary lawmaking.

In another address, Justice Stevens questioned the wisdom of continuing the application of the Rule of Four, the rule by which the Supreme Court agrees to grant certiorari to any case that at least four justices believe should be reviewed.[17] By its very nature, the rule "must inevitably enlarge the size of the Court's argument docket and cause it to hear a substantial number of cases that a majority of the Court deems unworthy of review."[18] Unless the members of the Court exercise greater restraint during the case selection process, the Rule of Four might become a luxury the Supreme Court can no longer afford.[19]

Justice Stevens recommended the establishment of an independent tribunal to perform the task of reviewing and passing upon petitions for certiorari.[20] He speculated that an independent tribunal probably would do a more effective job of reviewing petitions than the Supreme Court, which is generally too busy to give the certiorari docket the attention it deserves.[21] The delegation of the Court's

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Id. Justice Stevens observed that the Court's timing in taking cases often reflects a lack of patience. The Supreme Court has been known to grant certiorari prematurely rather than allow further proceedings at the trial court level that may have either clarified the constitutional issues or mooted the entire case. Id. "A willingness to allow the decisions of other courts to stand until it is *necessary* to review them is not a characteristic of this Court when it believes that error may have been committed." Id. at 181 (emphasis in original).

[17] Justice Stevens indicated in his speech that, although some of the Court's opinions in which only four votes had been granted had made a "valuable contribution to the development of our jurisprudence," such cases were "exceptionally rare." Address by Justice Stevens, The Life Span of a Judge-Made Rule, The James Madison 1982 Lecture, in New York City, at 31 (Oct. 27, 1982) (available in Cardozo Law School Library) [hereinafter cited as Stevens Speech]. He speculated that if the matter were really studied, "in a surprisingly large number [of cases in which certiorari was granted by the application of the Rule of Four] the law would have fared just as well if the decision of the court of appeals or the state court had been allowed to stand." Id. Justice Stevens suggested that, although the wisdom of the Rule of Four had seldom been questioned, perhaps it was time to do so. Id. at 25. But see Freund Report, supra note 10, at 39-40 (criticizing proposals to change the Rule of Four).

[18] Stevens Speech, supra note 17, at 34.

[19] Id. at 37.

[20] Stevens, supra note 14, at 181-82. Justice Stevens distinguished his proposal from that of the Freund Committee. The Committee proposed that petitions for review be filed initially in the National Court of Appeals, which would deny the vast majority of them and send several hundred each year to the Supreme Court for further screening and adjudication. The National Court would also hear and decide the merits of certain cases involving inter-circuit conflict. Freund Report, supra note 10, at 18, 47. Justice Stevens proposed that the new court be given final authority to decide whether to grant or deny a petition for certiorari, but that it be given no responsibility for deciding the merits of any case. Stevens, supra note 14, at 182.

[21] Stevens, supra note 14, at 182. In addition, Justice Stevens went on to say:

> I think the present Court does a poor job of performing that task. It grants too many cases and far too often we are are guilty of voting to grant simply because we believe error has been committed rather than because the question presented is both sufficiently important for decision on a national level and also ripe for decision when action is taken on the certiorari petition.

screening work to an independent tribunal would permit the Court to devote a greater percentage of its energies to the more important task of "studying and actually deciding the merits of cases that have already been accepted for review and writing opinions explaining those decisions."[22]

Agreeing in part with his colleagues, Justice Brennan expressed the belief that the Court has reached the limit in the number of cases it can decide in a term.[23] He agreed with Justice Stevens that the Court has often granted review to cases not deserving of its time and attention.[24] As for solutions, Justice Brennan emphatically rejected the proposal to have an independent tribunal exercise the Supreme Court's certiorari jurisdiction. To him, the screening task is "inextricably linked to the fulfillment of the Court's essential duties"[25] and is one of its most vital functions.[26]

Id. Justice Stevens has criticized the tendency of the Supreme Court in recent years to take on too many cases for the purpose of resolving conflicts among the circuits. The existence of differing rules of law around the country is not, according to Justice Stevens, an "intolerable evil," but may even be one of the virtues of the federal system. Id. at 183.

[22] Id. at 179. But see infra note 26 and accompanying text (Justice Brennan's strenuous objections to Justice Stevens' proposal).

Justice Stevens confessed that he generally delegates the responsibility of reviewing certiorari petitions to his law clerks. He opined that his colleagues were probably also treating the review of petitions as "second-class work." Stevens, supra note 14, at 179. But see infra note 26 and accompanying text (Justice Brennan's assertion that he does most of his own screening work).

[23] In his address before the Third Circuit Judicial Conference, Justice Brennan stated:

> For more than 15 of my 26 Terms starting in 1956, the Court averaged about 100 opinions per Term plus a few per curiams in argued cases. But since the 1970 Term that number has inexorably crept up, first to the high 120's, then to the 130's and last Term to 141 signed plus 9 per curiam. That didn't set any record—the 1975 Term produced 151 opinions, 138 signed and 13 per curiam. And since we schedule 160 hours of argument from October through April, it is clear that 150 is the maximum.

Remarks of Justice Brennan, Third Circuit Judicial Conference, in Philadelphia, at 2–3 (Sept. 9, 1982) (available in Cardozo Law School Library) [hereinafter cited as Brennan Speech]. "There is a limit to human endurance," said the Justice, and taking into account the increasing complexity of the cases coming before the Court, "the number 150 taxes that endurance to its limits." Id. at 3.

[24] "I must admit frankly that we too often take cases that present no necessity for announcement of a new proposition of law but where we believe only that the court below has committed error." Id.

Like Justice Stevens, Justice Brennan has said that the Court sometimes grants certiorari at an interlocutory stage of a case, when final disposition could be achieved at the lower court level without necessitating the resolution of an "important and difficult constitutional question." Id. at 4.

[25] Id. at 14.

[26] Justice Brennan has said that if the screening function of the Supreme Court were delegated to another court, as Justice Stevens and others have recommended, "some enormous values of the Supreme Court decisional process would be lost." Id. at 12. The existing procedure provides a forum in which the individual justices may express their interests and sensitivities. Such delegation of authority would "undermine the important impact dissents from denials of

Justice Brennan's proposals are considerably more conservative than those of Justices White and Stevens. He has urged greater care and restraint in the selection of cases for review[27] and the repeal by Congress of virtually all the Court's mandatory appellate jurisdiction.[28] He has also recommended the immediate study of Justice White's en banc and specialized courts of appeals proposals.[29]

Perhaps no member of the Court views the escalating caseload problem with the same degree of alarm as does Chief Justice Burger.[30] "We have reached the point," he commented recently, "where our systems of justice—both state and federal—may literally break down before the end of this century, notwithstanding the great increase in the number of judges and the large infusion of court administrators."[31]

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review frequently have had upon the development of the law." Id. In addition, it would undermine the ability of the Court to keep abreast of the everchanging concerns of American society. The creation of a National Court of Appeals would isolate "the Court from many nuances and trends of legal change throughout the land"; it would, in effect, "ren[d] a seamless web." Id. at 14; see Brennan, Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill Advised," 59 A.B.A. J. 835, 835-40 (1973).

As evidence of the fact that the screening function is "second to none in importance," Justice Brennan made clear that it is his practice to perform this task himself rather than to delegate it to law clerks. He noted that the task is never so time-consuming that it compromises his ability to attend to decisions of argued cases, and that in fact, "the longer one works at [the screening function], the less onerous and time-consuming it becomes." Brennan Speech, supra note 23, at 11-12.

[27] Brennan Speech, supra note 23, at 15.

[28] Id. Mandatory appellate jurisdiction exists whenever the Supreme Court is required to hear and decide the merits of a case pursuant to a statute. In all other cases, jurisdiction is discretionary. A litigant may appeal to the Supreme Court whenever a federal district court holds an Act of Congress unconstitutional in any civil action, suit or proceeding to which the United States is a party. 28 U.S.C. § 1252 (1976). Appeal is available from the federal courts of appeal to a party relying on a state statute, held by a federal court of appeals to be unconstitutional or repugnant to the treaties or laws of the United States. Id. § 1254. Appeal is also available when the highest court of a state holds a treaty or federal statute invalid, or upholds a state statute, the validity of which is questioned on the ground that it is repugnant to the Constitution, treaties or laws of the United States. Id. § 1257(1)-(2). See generally 2 C. Antieau, Modern Constitutional Law: The States and the Federal Government § 15:12 (1969) (general overview of the Court's mandatory appellate jurisdiction).

[29] Brennan Speech, supra note 23, at 15; see supra notes 12-13 and accompanying text.

[30] Burger, supra note 3, at 11-12. Chief Justice Burger offered some striking statistics in this address:

> [I]n the first year that my distinguished predecessor Chief Justice Warren served, the Court had 1,312 filings and the Court issued 65 signed opinions plus 19 per curiam opinions. Last term, we had 4,422 filings added to 889 filings carried over or 5,311 in all. We issued 141 signed opinions and 10 per curiam opinions.

Id. at 11.

[31] Id. at 12. The Chief Justice also made reference to recent remarks by "qualified court observers" concerning the increased complexity, difficulty and novelty of the cases coming before the Supreme Court:

> [Observers] point to the novelty of the questions for which, in many instances, there are virtually no precedents. Some observers have said that even if we had only 100

The Chief Justice feared that unless the caseload was reduced, the Court would fall further behind in its work and the quality of its opinions would suffer.[32] The reforms he thought worthy of further consideration included the abolition of all mandatory statutory rights of appeal, the placement of all cases under the Court's discretionary jurisdiction, and the creation of an intermediate court to which the Supreme Court would refer certain cases for adjudication.[33]

The Chief Justice returned to this subject in his 1983 State of the Judiciary Address before the American Bar Association.[34] Recognizing the opposition to the establishment of a National Court of Appeals—either to perform the screening process as proposed by the Freund Commission,[35] or to adjudicate the cases referred to it by the Supreme Court, as recommended by the Hruska Commission,[36]—the Chief Justice came forward with a new recommendation. He proposed the creation of a temporary panel to be attached to the new United States Court of Appeals for the Federal Circuit. The panel would be composed of twenty-six appellate judges, two from each of the thirteen courts of appeals. For periods of six months or a year, the temporary court would sit in a panel of seven or nine judges. Its principal jurisdiction would be to hear and decide all inter-circuit conflicts, with the Supreme Court retaining ultimate discretionary review by certiorari over its decisions. The court's existence would be limited to a period of five years, and would be designed as an experiment to see whether its operations would relieve the Supreme Court of some of its burdens. The Chief Justice estimated that the adoption of this proposal would reduce the Court's caseload by between thirty-five and fifty cases a year.[37]

> fully argued cases a year, the novelty and complexity of a large proportion of those 100 cases would strain the Court's capacity to the limit.

Id. at 11; see also Burger, Annual Report, supra note 3, at 443 ("Gradually over the last 30 years or more the content and complexity of the cases have changed drastically, and often there are few precedents to guide the courts in these new areas.").

[32] Burger, supra note 3, at 12.

[33] Id. at 11. These were among the proposals made by the Freund and Hruska Commissions.

The Chief Justice pointed out that the notion of separate appellate jurisdiction is not a new idea. In Europe, the use of specialized courts is widespread both at the trial and the appellate levels, where even the highest court may be divided into two or three tribunals. At least two states, Texas and Oklahoma, divide appeals to the state's highest courts between civil and criminal reviewing courts. Id. at 11-12.

[34] Burger, Annual Report, supra note 3.

[35] Freund Report, supra note 10, at 18.

[36] Hruska Report, supra note 10, at 238-39.

[37] Burger, Annual Report, supra note 3, at 447. "I would have confidence that 26 experienced judges assigned in this manner would resolve the conflicts among the circuits in such a way that the Supreme Court would not often grant further review." Id.; see also Meador, A

The Chief Justice also argued for the creation of a study commission composed of representatives of all branches of government to consider the ever-increasing volume of litigation at all levels of the federal courts and to recommend appropriate legislative solutions.[38]

The recent remarks of Justice Powell also reflect a deep concern over the number of certiorari petitions and appeals confronting the Court and the increasingly complex and novel issues that the Justices are called upon to decide.[39] "[T]he sheer volume of cert petitions and appeals—up nearly 500 this year over two years ago," said Justice Powell, "may prevent the same degree of judicial care, in selecting cases for full review, that probably existed a decade or more ago. . . . The need for fundamental changes . . . is self-evident if we are to preserve our federal system of courts, as contemplated by the Constitution."[40] Justice Powell has urged the replacement of the Court's mandatory jurisdiction with a system of review that is totally discretionary.[41]

Comment on the Chief Justice's Proposals, 69 A.B.A. J. 448, 448–50 (1983) (generally approving of the proposal). But see Remarks of Chief Judge Feinberg, United States Court of Appeals for the Second Circuit, Before the New York Patent Law Association, in New York City, at 6 (Mar. 25, 1983) (available in Cardozo Law School Library) (arguing that the administration of justice in the federal courts is best improved by measures that are incremental, not radical, like the creation of entirely new courts) [hereinafter cited as Feinberg Speech]; Kohn, Feinberg Hits 'Radical' Ideas to Solve Problems of Courts, N.Y.L.J., Mar. 28, 1983, at 1, col. 2 (suggesting that experimentation should be done with incremental, as opposed to radical, changes of the judiciary).

[38] Burger, Annual Report, supra note 3, at 447.

[39] In a speech delivered to the American Bar Association Division of Judicial Administration, Justice Powell explained that the "overload problem" is a function of both the number and the quality of cases before the Court. "As every judge knows, the type of issues presented—particularly constitutional and those arising from the vast array of social and regulatory legislation of the past two decades—exacerbates the situation. Cases are not fungible. They range from the utterly trivial . . . to cases of extraordinary complexity . . . ." Address by Justice Powell, American Bar Association, Division of Judicial Administration, in San Francisco, at 5 (Aug. 9, 1982) (footnotes omitted) (available in Cardozo Law School Library) [hereinafter cited as Powell Speech].

[40] Id. at 14. Justice Powell also expressed concern over the potential "bureaucratization" of the judicial system if the current trend continues. Id. at 3. He qualified his concern with the belief that the judging process itself had not yet threatened to become bureaucratized. Id. at 13–16; see infra note 42 and accompanying text (Justice Rehnquist's similar concern).

[41] Powell Speech, supra note 39, at 6. "In the federal system, the fundamental need is to reduce the rate of flow of cases into the district courts." Id. at 7. Justice Powell cited three sources of federal court jurisdiction that have constituted nearly forty percent of the total district court civil filings—diversity jurisdiction, civil rights suits under 42 U.S.C. § 1983 (Supp. V 1981), and habeas corpus jurisdiction to review state court convictions under 28 U.S.C. § 2254 (1976 & Supp. V 1981). Powell Speech, supra note 39, at 13. The Justice recommended the exhaustion of administrative remedies as a prerequisite to the institution of a section 1983 claim. Id. at 8. He suggested that collateral review by federal courts of state convictions be limited to cases of manifest injustice. Id. at 10. As for diversity jurisdiction, Justice Powell reiterated the "familiar proposal" that it be eliminated, but he did not expressly endorse this view. Id. at 7.

In an address at the University of Kentucky, Justice Rehnquist covered much the same ground as the other Justices, his essential fear being that with the ever-increasing caseload, the Court was headed toward greater "bureaucratization."[42]

The particular concern of Justice Marshall was not so much with the sheer number of cases that the Court is called upon to decide, but with the manner in which it has been deciding cases in recent years. In remarks before the Second Circuit Judicial Conference, the Justice indicated his distress over the fact that, more and more, the Court is resorting to the summary disposition of cases via per curiam opinions, without the benefit of full briefing and oral argument.[43] "I am disturbed by the all-too-often cavalier treatment of the rights and interests of the parties involved in such cases,"[44] he declared. In order to provide litigants an opportunity to be heard, and the Court the benefit of an adversarial presentation of the issues, Justice Marshall recommended that, on those occasions when the Court concludes that summary reversal or affirmance is appropriate, it notify the parties of this fact and afford them the opportunity to file briefs on the merits.[45]

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[42] Justice Rehnquist was apprehensive that a situation might arise in which clerks, attorneys and other subordinates performed the actual work of judging, while judges acted merely as staff managers. Remarks of Justice Rehnquist, Mac Swinford Lecture, University of Kentucky 27-30 (Sept. 23, 1982) (available in Cardozo Law School Library).

Justice Rehnquist cited the Eastern District of Kentucky and the Sixth Circuit as but two examples of jurisdictions in which caseloads have escalated in the last forty-five years. According to the Justice, on June 30, 1937, there were 209 cases pending in the Eastern District of Kentucky; by the end of 1981, there were 3,555—a caseload of 711 cases per judge. Similarly, on June 30, 1981, 2,553 cases were pending before the Sixth Circuit—about 232 cases per judge. Id. at 11-12.

Justice Rehnquist also noted that, although judgeships in the Eastern District of Kentucky had multiplied fivefold since 1937, the caseload per judge had increased more than threefold in that period. Similarly, judgeships in the Sixth Circuit had increased almost threefold since 1937, while the case load per judge was now more than double what it was in 1937. Id. at 12. Justice Rehnquist stated:

> Escalating case loads of necessity cause a multiplication in the number of judges, with the possibility down the road that indefinite multiplication of judicial positions may well detract from the "prestige" of the job, an important element which has enabled the federal judiciary to command the respect which it has today.

Id. at 29.

[43] Remarks of Justice Marshall, Second Circuit Judicial Conference 4-5 (Sept. 9, 1982) (available in Cardozo Law School Library). Justice Marshall expressed concern that with the increased use of summary dispositions, significant issues might be receiving only cursory treatment, thereby heightening the possibility of error and confusion; that summary dispositions were being used to decide cases that had failed to meet the traditional criteria for Supreme Court review; and that the device had often been used in a result-oriented fashion. Id. at 5-7.

[44] Id. at 7-8.

[45] Id. at 8-9.

This short compilation of recent statements by the Justices demonstrates a pervasive concern with the Court's ability to cope with its ever-increasing workload. Despite disagreements regarding the extent and nature of the necessary remedial measures, it is at least clear that *something* must be done—and done quickly.

II. The Screening Process

Applications for certiorari fall into two categories, the paid and the *in forma pauperis* dockets. The number of petitions for certiorari on the paid docket has increased during the past twenty years from 1,062 in the 1961 Term[46] to 2,935 in 1981.[47] The corresponding figures for the *in forma pauperis* docket were 1,495 in 1961[48] and 2,354 in 1981.[49]

For many years, petitions were either examined by the Justices themselves or were screened by their law clerks, who prepared summaries for their respective Justices. In recent years, six of the Justices have formed a pool to which a clerk from each of the chambers is assigned, and the preparation of memoranda is divided among them. The other three Justices either review petitions themselves or have separate memoranda prepared within their own chambers.

While the statistics are quite forbidding,[50] the raw numbers unduly magnify the burden imposed by the screening process. After all, the Justices primarily decide petitions upon the memoranda of their clerks or upon a simple examination of the questions presented. For example, Justice Black told me years ago that based upon his many years on the Court, he could determine whether a question was or was not cert-worthy in the space of several seconds. When I served as

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[46] The Supreme Court, 1961 Term, 76 Harv. L. Rev. 54, 81 (1962). This figure includes both cases disposed of and cases remaining on the docket at the end of the Term. It does not include cases on the original docket.

[47] The Supreme Court, 1981 Term, 96 Harv. L. Rev. 1, 308 (1982). This figure includes both cases disposed of and cases remaining on the docket at the end of the Term. It does not include cases on the original docket.

[48] The Supreme Court, 1961 Term, supra note 46, at 81.

[49] The Supreme Court, 1981 Term, supra note 47, at 308.

[50] In the 1920's, the number of petitions for certiorari per term ranged in the hundreds. See Frankfurter & Landis, The Supreme Court Under the Judiciary Act of 1925, 42 Harv. L. Rev. 1, 13 (1928). From 1935 to 1971, the number of new cases filed per term went from 983 to 3,643. Freund Report, supra note 10, at A2. From 1972 to 1981, the number of cases increased from well over 4,000, The Supreme Court, 1972 Term, 87 Harv. L. Rev. 1, 310 (1973), to a figure in excess of 5,000, The Supreme Court, 1981 Term, supra note 47, at 308. It should be noted that these figures represent both filings for the current terms and filings carried over from previous terms. For example, as Chief Justice Burger pointed out in his recent address, there were 4,422 filings in the 1981 Term and 889 filings carried over from the previous term, bringing the total to 5,311. Burger, supra note 3, at 11.

Justice Stone's law clerk in the 1926 Term, he customarily spent approximately half an hour immediately before the Court's conference to examine some twenty-five to thirty memoranda on the weekly certiorari list.

Of course, there are occasions when a Justice must examine the papers and the opinions below in order to satisfy himself that the clerk's analysis and recommendation are correct. Moreover, one should not minimize the effort necessary to examine several thousand memoranda during the course of a busy term when the Justices are preoccupied with getting ready for hearings, studying the cases argued on the merits, organizing their views for the conferences and working on opinions. Nor should one minimize the extent to which the distraction of having an endless stream of memoranda pass over a Justice's desk can interfere with the performance of the more exacting work of the Court.

Without magnifying or minimizing the burden imposed by the screening process, the fact remains that the Court needs some relief from the task of reviewing approximately five thousand certiorari petitions each term. First, let us consider what the Court itself can do and then turn to some of the proposals that involve legislative and structural changes.

The growing tendency of the Court to decide cases on the merits in the form of per curiam opinions—a procedure which, as we have seen, Justice Marshall regards as antithetical to sound principles of due process[51]—cannot but increase the effort that the Justices must devote to the screening process. The Court's current proclivity toward summary action encourages lawyers to present expansive written arguments touching on the merits, rather than to confine their briefs to the cert-worthiness of the questions presented. After all, how is counsel to know what disposition will be made of his case? I thus concur in Justice Marshall's view that decision should be deferred until briefs on the merits are filed in those instances where the Court feels it should address the merits of the litigation.

It is the consensus of those who have had experience with the certiorari process that a preponderance of the applications lack merit or border on the frivolous. Why should this state of affairs continue year after year?

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[51] Justice Marshall's criticism is directed primarily towards summary dispositions on petitions for certiorari. This is to be distinguished from a summary disposition on a notice of appeal, over which Supreme Court jurisdiction is mandatory. See supra note 43 and accompanying text.

The Court's certiorari rule is itself partly responsible for encouraging the filing of groundless petitions. Rule 17 provides that certiorari "will be granted only when there are special and important reasons therefor."[52] Among the reasons listed are: conflicts among the courts of appeals or between the courts of appeals and the rulings of the highest courts of the states, or where important questions of federal law have been decided by either a state or federal court that have not been but that should be settled by the Supreme Court, or where a federal question has been decided in a way that conflicts with the applicable decisions of the High Court.[53] The emphasis is primarily upon the element of conflict.

It should be noted that rule 17 does not require that the conflict being asserted relate to important questions. Seemingly, it is enough that there is a conflict. Only with regard to questions of federal law that have not been but should be settled by the Supreme Court is there the qualification that the question be an important one.

Are we not giving too much weight to the element of conflict? The Supreme Court is not a court for the correction of every error committed by the lower courts. It could not physically do so even if it so desired. Unless the question is of great significance and its resolution is vital to the operation of our society, the fact that there is a conflict should not be decisive. The Court must husband its resources.

In my view, we tend to exaggerate the element of conflict. There are no hard facts available on the extent and seriousness of the conflicts. What statistics there are appear to be nothing more than guesses and estimates. Upon examination, many of the claimed conflicts prove not to exist. Those that relate to fields based on diversity jurisdiction would disappear if the diversity cases were handled by the state courts, where they belong.

The judicial system is not likely to collapse because a rule in the Ninth Circuit differs from one in the First or Second. Conflict is endemic to our common law system. In most areas of the common law, there are different lines of authority—the rule in Massachusetts frequently differs from that in New York, Illinois from California, and so forth. The country has survived these conflicts, which gradually diminish with time and as a result of scholarly analysis. This is a big country, and the existence of differences in the laws of the various states is not a major tragedy. Many conflicts among the courts of appeals can be tolerated.[54] On the other hand, there are fields in which conflicts produce uncertainty and have adverse political, social and economic consequences. These are the kinds of cases that merit Supreme Court review.

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[52] Sup. Ct. R. 17(1).

[53] Id. Review may also be granted where a court has so far departed from accepted and usual course of judicial proceedings as to call for the Supreme Court's power of supervision, or where a state court of last resort has decided a federal question in a way that conflicts with the decision of either another state's highest court or a federal court of appeals. Id.

The law reviews of the country would be rendering a signal service if they invited experts in the major fields of law to canvass and appraise the significant conflicts that are left unresolved, and to analyze the jurisprudential effect of the continuation of such conflicts. The reviews could also conduct a continuous examination of both inter-circuit and intra-circuit conflicts. From these studies, we would be able to conclude how serious the conflict problem really is and formulate effective measures for its elimination.

I shall return to the subject of conflicts in a later part of this Article, and analyze several proposals that the Justices have made for its treatment.

I am pleased that the Justices themselves now recognize that they have contributed to the problem and that part of the solution must be found in the correction of some of their own screening practices. They all recognize that review is sometimes granted to cases that are not entitled to the time and effort that go into decisions on the merits, and they admit that there is room for improvement in their selection of cases.

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[54] The Hruska Commission concluded that a substantial number of conflicts were not receiving the attention of the Supreme Court, and that a new tribunal was needed to assist the Court in its function as a settler of conflicts. Hruska Report, supra note 10, at 221-24. Compare Cutler, Help for High Court, N.Y. Times, Nov. 1, 1982, at A19, col. 2 (proposing the creation of a Judicial Panel on Mulitcircuit Conflicts to resolve asserted conflicts between appellate courts).

Judge Feinberg disputed the findings of the Hruska Commission, arguing that the number of significant inter-circuit conflicts was too small to justify the creation of a new tribunal, that most of the conflicts were in specialized areas like tax and patents, and that the balance of the conflicts tended to relate to insignificant issues. Feinberg, Foreword: A National Court of Appeals?, 42 Brooklyn L. Rev. 611, 620-23 (1976). He contended that the mere existence of inter-circuit conflict was not in itself an intolerable state of affairs but was in fact beneficial to the development of the law. "Even as to relatively mundane questions, a judge attempting to arrive at a correct solution can profit by the different facets of the problem brought out by the different perspectives of other judges who have confronted it." Id. at 624.

Other judges and commentators have questioned whether the existence of inter-circuit conflicts is really as serious a problem as some have claimed. Many have argued that the problem has been greatly exaggerated, and that the number of inter-circuit conflicts left unresolved in any one term is relatively small. See H. Friendly, Federal Jurisdiction: A General View 52 (1973); Alsup, Reservations on the Proposal of the Hruska Commission to Establish a National Court of Appeals, 7 U. Tol. L. Rev. 431, 435 (1976); Swygert, The Proposed National Court of Appeals: A

One of the difficulties that commentators face in analyzing the overload problem and proposing workable solutions is a lack of available information regarding the case selection process. Since the basis of selection is never revealed, only the Justices are in a position to criticize this aspect of the Court's work, which they have done repeatedly in dissenting opinions on certiorari rulings and in various addresses. If the memoranda that are prepared for the Justices were made available to the bar, or to scholars on a limited basis, commentators would be in a better position to provide the kind of constructive criticism that the Court itself has acknowledged is most helpful to it in regard to its substantive rulings.[55]

I therefore would recommend that, after a reasonable number of years have elapsed, the Court place in its library copies of all the

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Threat to Judicial Symmetry, 51 Ind. L.J. 327, 336 (1976) (agreeing with statement of Chief Judge Kaufman of the Second Circuit Court of Appeals); Address by Hon. Robert Bork, Dealing with the Overload in Article III Courts, at National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, in St. Paul, Minnesota (Apr. 7-9, 1976), published in 70 F.R.D. 231, 235 (1976). Several commentators have pointed out that the Supreme Court eventually does resolve most inter-circuit conflicts within a reasonable time when substantial questions of national law are involved. See Alsup, supra, at 435-36; Lay, Why Rush to Judgment? Some Second Thoughts on the Proposed National Court of Appeals, 59 Judicature 172, 174 (1975). Even when the Supreme Court leaves a conflict unresolved, there may be other legitimate reasons for denial of certiorari besides the inability to take the case for lack of time. Id. at 175. Moreover, as several commentators have argued, circuit conflicts are sometimes beneficial. It is often best to allow an issue to "percolate" among the lower courts and to enable scholars, law reviews, interest groups and bar committtees to express their views on the subject before a final resolution of the issue is reached. Alsup, supra, at 445. Judge Lay of the United States Court of Appeals for the Eighth Circuit has written:

> [There is] value [in] having important national legal questions resolved slowly, allowing many lower courts to approach an issue anew, each considering what others have done and yet rethinking the justice and policy of the question as it is presented on the particular facts before each court.
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> . . . [T]he temporary hardship this causes is greatly outweighed by the benefits of being able to observe the practical results of adopting one interpretation as opposed to another.

Lay, supra, at 178. But see Schaefer, Reducing Circuit Conflicts, 69 A.B.A. J. 452, 454-55 (1983)(stressing the importance of a uniform body of national law).

[55] Justice Harlan once stated:

> Constructive criticism of judicial decisions, as with other aspects of the work of the courts, is a good thing for the judiciary and for healthy development of the law. Only a warped judicial outlook could think otherwise.
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> . . . Much of the useful criticism of judicial decisions, whether from the standpoint of substance or professional quality, now comes from the law schools. I believe it would be of great value were their output to be supplemented on an organized basis by bar critiques bringing to bear the points of view of active practitioners on important cases.

Harlan, Thoughts at a Dedication: Keeping the Judicial Function in Balance, 49 A.B.A. J. 943, 945 (1963).

memoranda on which it based its rulings on petitions for certiorari, motions to affirm or dismiss and cases disposed of by summary action. Access to these memos could be limited to scholars studying the process by which the Court exercises its discretionary jurisdiction, or to the profession, if such limitation was deemed unnecessary. It is my belief that studies of the selection process could be most instructive and could yield guidelines that would have a salutory effect in keeping down the number of applications for review.

Since it would be a monumental task for any scholar to appraise every petition for certiorari filed within any one term, to say nothing of the expertise required for so formidable a task, it might be well for a given scholar to concentrate on one or more fields in which he has some degree of expertise. The area of antitrust may serve as a good example.

According to Justice White, there were ninety-eight petitions for certiorari raising antitrust issues filed during the 1981 Term. Certiorari was granted in five of these.[56] I quote from Justice White's summary of the issues presented by these five cases:

> The United States is a party to one of the five cases; the issue there is whether § 8 of the Clayton Act forbids interlocking directors between banks and insurance companies. The other four are private suits. Two of them involve the reach of the Robinson Patman Act, the question in the one being whether the good faith meeting of competition defense can be made out by market wide rather than customer to customer pricing and in the other whether sales to local government agencies that compete with privately owned business are *per se* exempt from the Act. There is one private price-fixing, conscious parallelism case, quite a large one as I understand it, and another dealing with access to grand jury materials in the Justice Department files. No particular blockbusters but again there will be a substantial investment of time in the antitrust field.[57]

Justice White was frank enough to admit that there are no blockbusters among the five cases granted review. I think it is fair to say that there *have* been blockbusters among antitrust cases in which certiorari has been denied in recent terms. Neither Justice White nor any of the other Justices has explained why the Court selects cases of slight antitrust importance and leaves other questions of transcendent significance unreviewed.

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[56] White Address, supra note 7, at 4.

[57] Id. at 4-5.

It is difficult to understand why the Court felt compelled to grant review to two Robinson-Patman[58] cases.[59] The Robinson-Patman Act is virtually a dead letter. The Department of Justice has recommended its repeal.[60] The Federal Trade Commission no longer devotes a large portion of its efforts to that statutory relic of the NRA[61] era of special interest protectionism.[62] Yet, in a dying corner of antitrust, the Court takes up two cases at the very time it is complaining about its heavy work load.

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[58] Robinson-Patman Anti-Discrimination Act, 15 U.S.C. §§ 13-13b, 21a (1982).

[59] In Jefferson County Pharmaceutical Ass'n v. Abbott Labs., 103 S. Ct. 1011 (1983), a divided Court (five to four decision) held that the Robinson-Patman Act applied to sales of pharmaceutical products to state and local government hospitals for resale in competition with private retail pharmacies. The decision of the majority was based upon its reading of the legislative history of the Robinson-Patman Act, with no weight given to the contrary course of construction by enforcement agencies and the lower courts. Curiously, a Court that is not infrequently result-oriented has added fuel to the escalating costs of health care.

In Falls City Indus. v. Vanco Beverage, Inc., 103 S. Ct. 1282 (1983), the Court construed the "meeting-competition" defense as operative not only where a specific competitive price is met on a customer-by-customer basis, but also where the challenged price is a response to a competitive price prevailing in a marketing area. Prices may be matched not merely to hold onto existing customers but also as a means of obtaining new patronage.

[60] "An Administration Task Force is in the final stages of preparing recommendations to the President concerning reform or repeal of the Robinson-Patman Act. That Act clearly discourages price competition and may operate to encourage vertical integration by large retailers." Address by Deputy Attorney General Harold R. Tyler, Jr., Regulatory Reforms For America's Economy, at Antitrust Section, ABA Annual Meeting (Aug. 10-13, 1975), published in 44 Anti-Trust L.J. 592, 596 (1975). In 1977, the Department of Justice conducted an exhaustive review of the Robinson-Patman Act and concluded:

> [C]areful reconsideration of the Robinson-Patman Act is timely. This evidence seriously undermines historic claims that the Robinson-Patman Act offers any sustaining economic protection to small business; and it raises serious questions whether the Act advances the competitive goals of other antitrust laws. Rather, the evidence is that the Act promotes high prices, restricted entry, and inefficiency in the distribution of goods; and it has encouraged the creation of illegal pricing exchanges by competing manufacturers.

U.S. Dep't of Justice, Report on the Robinson-Patman Act 260 (1977); see also Corporate Counsel Institute Focuses on Antitrust Enforcement, [July-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 1036, at A-3 (Oct. 22, 1981) (Assistant Attorney General William F. Baxter characterizing the Robinson-Patman Act as "a deplorable piece of legislation" and pledging that its enforcement would be a low priority).

[61] The National Recovery Administration was established by the Act of June 16, 1933, ch. 90, 48 Stat. 195, and terminated in 1936 by Exec. Order No. 7252, reprinted in 15 U.S.C. § 703 at 1190 (1982); Exec. Order No. 7323, 1 Fed. Reg. 69 (1936), reprinted in 15 U.S.C. § 703 at 1190-91.

[62] The American Bar Association, Section of Antitrust Law stated:

> Although for approximately twenty years following enactment the Federal Trade Commission devoted an overwhelming preponderance of its antitrust enforcement resources to the Robinson-Patman Act, in the last decade the Commission has done little more than pay lip service to the statute. In 1976, the House Small Business Committee reported that in comparison with eighty Robinson-Patman complaints issued in 1965, a total of only eight issued in the three years 1972-74.

Likewise, how important is it to determine whether section 8 of the Clayton Act[63] forbids interlocking directorates between banks and insurance companies? It is especially difficult to understand why the Court should have decided to deal with this problem, since legislation has been pending for decades to broaden the prohibitions of section 8 so as to make it applicable to interlocks among companies that are not in direct competition with one another.[64] This, after all, is a matter of policy for the lawmakers, not the Court, to decide.

Part of the reason the Court is burdened with so many petitions is the ease with which losing litigants may file them. There is virtually no financial disincentive to discourage the losing party from seeking certiorari from just about every decision of the several courts of appeals. Counsel already has briefed the merits of the case fully, and the record before the circuit court can easily be filed with the Supreme Court. Compared to the amount of time and money already expended, it is a relatively simple matter for counsel to draft a petition based upon its court of appeals brief and the opinion of that court. A litigant has everything to gain and little to lose.

The time has come to restrict the opportunity to petition the Court to those litigants whose cases are truly cert-worthy. The energies of the Court and its staff ought not to be expended in so fruitless a task as screening meritless or frivolous petitions. Yet the doors must not be closed to meritorious appeals. One would expect the widest possible latitude in defining what is meritorious, and every possible doubt should be resolved in favor of permitting applications for review to be made to the Court.

I believe there is a simple corrective. The court of appeals, as a matter of routine, should recite whether it believes the questions it has decided meet the standards for Supreme Court review. If it does not believe that they do, and if the losing litigant nevertheless submits a petition to the Court, penalty costs should be imposed if the Court

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1 The Robinson-Patman Act: Policy and Law (Monograph 4), 1980 A.B.A. Sec. Antitrust Law 3 (footnote omitted).

[63] 15 U.S.C. § 19 (1982).

[64] Although no such measure was proposed in either the 97th or 98th Congresses, legislation to prohibit certain corporate management interlocking relationships has been pending in the House of Representatives for each of the last ten Congresses prior to 1981. There have been no such companion bills in the Senate, however. See H.R. 4154, 96th Cong., 1st Sess. (1979); H.R. 7337, 95th Cong., 1st Sess. (1977); H.R. 11,110, 94th Cong., 1st Sess. (1975); H.R. 11,581, 93d Cong., 2d Sess. (1974); H.R. 14,997, 93d Cong., 2d Sess. (1974); H.R. 3245, 92d Cong., 1st Sess. (1971); H.R. 2346, 91st Cong., 1st Sess. (1969); H.R. 2509, 90th Cong., 1st Sess. (1967); H.R. 11,572, 89th Cong., 1st Sess. (1965); H.R. 73, 87th Cong., 1st Sess. (1961); see also S. 1659, 82d Cong., 1st Sess. (1951) (proposing a bill to amend section 8 of the Clayton Act).

denies certiorari without a single justice voting to review the case. The petitioner should be assessed the full costs of the respondent in opposing the application, together with a reasonable attorney's fee. The petitioner, having been put on notice by the court of appeals that penalty costs might be imposed if certiorari is denied, proceeds at his own risk in applying to the Supreme Court.

It should be emphasized that the proposed penalty would be narrowly limited to those cases in which there is both a finding by the court of appeals and a decision of a unanimous Supreme Court that certiorari should not have been sought. It is impossible to mathematize how many filings would be discouraged by the adoption of this recommendation, but it is clear that the number would not be insubstantial.[65]

This recommendation relates only to the paid docket. I have a different suggestion for the *in forma pauperis* petitions, of which only a minute percentage are granted in any term.[66] I would continue the present procedure of requiring the Court's staff to process these applications. But instead of requiring that all of the Justices review the thousands of memoranda so prepared, I believe consideration should be given to the possibility of enlisting the assistance of three courts of appeals judges with senior status to spend a month on a rotating basis with the Court reviewing the staff memoranda. This monthly panel would screen out the petitions that it deems unworthy of review, and submit to the Court the few applications that it feels should be passed upon by all of the Justices. The panel would indicate which petitions should be denied with perhaps a one-sentence summary of the question presented, and would provide the Court with its own recommendations and comments on those petitions it believes the Court should review for itself. The assistance of such a panel would reduce the number of memoranda for the Court's inspection from over two thousand to about fifty, and should save a considerable amount of time and effort for each member of the Court.

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[65] The imposition of a penalty on a litigant who pursues what is ultimately determined to be an unmeritorious claim is not without precedent. "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs." 28 U.S.C. § 1912 (1976). "When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages." Sup. Ct. R. 49(2); see also id. 50(1) ("In a case of affirmance of any judgment or decree by this Court, costs shall be paid by appellant or petitioner, unless otherwise ordered by the Court.").

Similarly, penalties have been imposed on counsel for excessive costs:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (Supp. V 1981).

[66] Of the 2,354 *in forma pauperis* petitions filed in the 1981 Term, less than one percent were granted review. The Supreme Court, 1981 Term, supra note 47, at 308.

In the five terms prior to 1981, the percentage of *in forma pauperis* petitions granted review was somewhat higher, though never exceeding two percent. See The Supreme Court, 1980 Term, 95 Harv. L. Rev. 17, 342 (1981); The Supreme Court, 1979 Term, 94 Harv. L. Rev. 1, 292 (1980); The Supreme Court, 1978 Term, 93 Harv. L. Rev. 1, 278 (1979); The Supreme Court, 1977 Term, 92 Harv. L. Rev. 1, 332 (1978); The Supreme Court, 1976 Term, 91 Harv. L. Rev. 1, 298 (1977).

Any effort to discourage or penalize the filing of *in forma pauperis* petitions would probably meet with massive resistance and widespread rejection, despite the fact that such petitions consist largely of claims of criminal defendants, twice rejected by the state courts and usually denied by the district courts and courts of appeals under the Federal Habeas Corpus Act.[67] But my proposal would entail no fundamental structural change in the judical system. It is far less radical than the proposed National Court of Appeals, a tribunal whose function would be to handle the entire screening process for the Court. All that I am suggesting is that the Court enlist the aid of experienced judges to provide relief in an area where relief is needed.

Nor would this proposal jeopardize the interest of any litigant. The panel would probably err on the side of presenting too many rather than too few of the applications for action by the Court. Its examination and consideration of the staff's memoranda would be an added safeguard against a potential miscarriage of justice. If some of the Justices—like Justice Brennan—would prefer to examine the staff memoranda or the petitions themselves, the adoption of this recommendation in no way would preclude them from having all such material submitted to them for their own scrutiny.

Unlike the recommendation of the Freund Committee, or of Justice Stevens, my suggestion would neither delegate excessive authority to judges who are not members of the Supreme Court nor make "super clerks" of them. No senior judge would have to accept the invitation if he did not so desire. He would spend only one month in Washington. He would have an opportunity to learn more about the Court's operation and, reciprocally, the Supreme Court would gain insight into the functioning of the courts of appeals. It would be reassuring to have the law clerks' memoranda reviewed by three experienced judges. I doubt that most senior judges would regard it as a denigration of their status to be associated for a short period of time with the highest court of the land.[68]

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[67] 28 U.S.C. § 2254 (1976).

Probably the most significant reform of the screening process would be the adoption of Justice Stevens' suggestion that the Rule of Four be changed to a Rule of Five, for it is clear that the Rule of Four is no longer useful in coping with the flood that engulfs the Court. In 1925, when discretionary review was first effected,[69] both Congress and the bar had to be assured that the 1925 Act would not stand in the way of meritorious appeals to the Supreme Court. In the 1925 and 1926 Terms, the number of petitions for certiorari was 535 and 586 respectively,[70] and there were no *in forma pauperis* petitions. Today, the number of petitions for certiorari is no longer manageable. In the 1981 Term, the number of petitions was 2,935 and 2,354 for the paid and unpaid dockets.[71] Yet the Supreme Court has continued to adhere to a rule for selecting cases that was designed for another era. The Justices themselves have noted that a minority of four at times may saddle the Court with cases that simply do not warrant further review. It has also been asserted that in a surprisingly large number of cases granted review on the basis of a minority vote, the law would probably have fared just as well if the decision below had been allowed to stand.[72] With the Court so pressed for time, it can ill afford to take up cases that less than a majority of its members believes are deserving of further consideration.

The adoption of a Rule of Five would have a twofold salutary effect. It would discourage the filing of undeserving petitions, and would reduce the number of cases that the Court hears and decides on the merits—a subject to which I now turn.

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[68] It has been suggested that the task of screening certiorari petitions be delegated to shifting panels of three Supreme Court justices, in which any one justice would have the right to bring the matter before the full Court. See the references in Feinberg, supra note 54, at 626; Friendly, Averting the Flood by Lessening the Flow, 59 Cornell L. Rev. 634, 656 n.77 (1974).

I personally am opposed to any reform that moves in the direction of the High Court dividing itself into panels for any purpose. The strength of the Court derives from the fact that it acts as a single unit with all of the justices participating in every one of the Court's actions. I believe we would be establishing a wrong precedent if we broke up the Court into separate parts for handling the screening function.

[69] Act of Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936.

[70] Frankfurter & Landis, supra note 50, at 13. These figures exclude writs of error, petitions for certiorari disposed of by full opinion of the Court, and petitions for certiorari granted to enable reversal of a case without consideration.

[71] The Supreme Court, 1981 Term, supra note 47, at 308. These figures include both cases disposed of and cases remaining on the docket. They do not include cases on the original docket.

[72] Stevens Speech, supra note 17, at 28, 31; see supra note 17 and accompanying text.

III. REDUCING THE NUMBER OF APPEALS TO BE DECIDED ON THE MERITS

Perhaps the most obvious approach to reducing the number of appeals to be decided on the merits is the abolition of what little remains of mandatory appellate jurisdiction, which should be replaced with a system of review that is entirely discretionary. Legislation to this effect is pending in the Congress[73] and should be enacted promptly, given the strong support of the entire bar of the country. Replacing mandatory with discretionary jurisdiction would enable the Court to reject a number of appeals which it otherwise would be required to review, and would substantially conform the law to the Court's existing practice. It is estimated that with this change, the Court could reduce its hearing calendar by as many as twenty-five appeals.[74]

Other proposals for reducing the size of the argument calendar have met with less than unanimous approval. Chief Justice Burger, as previously noted, has proposed that a temporary appeals panel be appended to the United States Court of Appeals for the Federal Circuit for the purpose of handling cases that raise inter-circuit conflicts. Justice White has proposed a special procedure by which the courts of appeals can themselves resolve inter-circuit conflicts. Others have suggested the creation of specialized appeals courts designed to adjudicate cases in specialized areas of the law. I shall focus upon each of these suggestions separately.

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[73] In February 1983, Senator Heflin of Alabama introduced a bill in the 98th Congress that would provide greater discretion to the Supreme Court in selecting the cases it reviews. Senate bill 385 was drafted to eliminate mandatory Supreme Court review for several classes of federal court cases, though it would not eliminate all mandatory jurisdiction. S. 385, 98th Cong., 1st Sess., 129 Cong. Rec. S894 (daily ed. Feb. 2, 1983) (statement of Sen. Heflin).

Similar bills to eliminate mandatory jurisdiction have been introduced in both the Senate and House of Representatives of the 97th and 96th Congresses. See H.R. 2406, 97th Cong., 1st Sess. (1981); S. 450, 96th Cong., 1st Sess. (1979); H.R. 2700, 96th Cong., 1st Sess. (1979); see also Freund Report, supra note 10, at 25–38 (advocating that all cases be brought to the Supreme Court by certiorari rather than by appeal).

[74] Burger, Year-End Report, supra note 3, at 6. Chief Justice Burger has noted that this modest reform is supported by all nine Justices and has no opposition from any source, yet it has not been enacted. Id at 3.

Commenting on a similar proposal by the Freund Committee to abolish mandatory jurisdiction, Judge Friendly remarked, "While [abolition of mandatory jurisdiction] would not decrease the number of certioraris, the net saving of the Court's time would be substantial." H. Friendly, supra note 54, at 50; see Mandatory Appellate Jurisdiction of the Supreme Court—Abolition of Civil Priorities—Jurors Rights: Hearing on H.R. 2406 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 1st Sess. (1982); Court Reform Legislation: Hearing on S. 1531 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981).

Presumably, the temporary appeals panel that the Chief Justice has proposed[75] would hear appeals from the thirteen courts of appeals whenever an appellant asserted the existence of an inter-circuit conflict. The appeals panel would become a fourth layer in the federal court system, wedged in between the Supreme Court, now the third layer, and the courts of appeals, the second layer. The Supreme Court would retain certiorari jurisdiction over the new tribunal. To be sure, the Supreme Court would not be as generous in granting certiorari from the new court as it has been in the past in granting certiorari from the courts of appeals in instances of claimed inter-circuit conflicts. Undeniably, the implementation of Chief Justice Burger's proposal would reduce the Court's case load.

But at what price? The addition of a fourth layer to the federal court system would mean that there could be three appeals before a conflict is finally resolved. The Freund and Hruska proposals were opposed, in part, for this very reason; these proposals would have inserted a new layer of appellate courts into the federal system.[76] This is precisely what the new proposal would accomplish, albeit on a temporary basis. For this reason, it is not unlikely that the creation of the new court would meet with strong opposition on the part of the judges of the court of appeals.

Does it make sense to solve one court's problems at the expense of another? The litigation explosion is not limited to the Supreme Court; the floodwaters threaten to inundate the courts of appeals as well. In the Second Circuit alone, the number of cases filed anually has in recent years approached and even exceeded three thousand.[77] To take twenty-six judges away from the intermediate appeals courts and place them on the new court would deplete the judicial resources of the courts of appeals at the very time when they are having difficulty coping with their own critical overload. Despite these serious reservations, I would not be adamant in denying the Chief Justice's proposal a fair trial to see whether it would work. However, if it evokes as widespread an opposition as the Freund and Hruska reports, we should continue our search for alternative solutions.

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[75] Burger, Annual Report. supra note 3, at 447; see supra note 37 and accompanying text.

[76] Critics of the Freund Report hypothesized that the creation of a National Court of Appeals would entail the addition of "a completely distinct judicial layer, with its concomitant bureaucracy and expense." Comment, The National Court of Appeals: Composition, Constitutionality, and Desirability, 41 Fordham L. Rev. 863, 885; (1973). Judge Friendly felt that a National Court of Appeals would add further delay to the appeliate process. H. Friendly, supra note 54, at 53-54.

Critics of the Hruska Report were equally bothered by the prospect of added delay that a National Court of Appeals would entail. Judge Feinberg wrote:

> The proposed court will also create a fourth tier of review and new areas of potential litigation on questions of jurisdiction. It is safe to say that if there is one thing the appellate process does not need now, it is another level of review. In all cases, the additional expense and delay would be undesirable.

Feinberg, supra note 54, at 615 (footnote omitted). Judge Lay voiced similar concerns over the inevitable delay that would be added to the "already interminable appellate process." Lay, supra note 54, at 174. Judge Swygert of the Court of Appeals for the Seventh Circuit expressed concern that the proposed court would create "more work for the Justices of the Supreme Court and the circuit judges, more litigation, greater costs, and longer delays in the appellate process." Swygert, supra note 54, at 345; see also Owen, Commentary: The Hruska Commission's Proposed National Court of Appeals, 23 UCLA L. Rev. 580, 602 (1976) (National Court could potentially subject litigant to four tiers of federal review).

Curiously, a bill that has been introduced in the Senate to carry out the Chief Justice's proposals[78] does not limit the jurisdiction of the proposed temporary court to the resolution of inter-circuit conflicts. Rather, the court is given authority to decide any case that is referred to it by an affirmative vote of five members of the Supreme Court. Unless modified or overruled by the High Court, the decisions of the inter-circuit tribunal will be binding on all courts of the United States.[79] Thus, on a temporary basis, there would be established what is tantamount to a second Supreme Court, save in the instances in which the Court decided to review the tribunal's determinations.

For the same reasons that the Hruska recommendations have thus far been rejected, I would strenuously oppose vesting the new tribunal with the broad authority provided by the pending bill. It is one thing to experiment with a temporary tribunal to resolve inter-circuit conflicts. It is quite another to set up, even on a temporary basis, a new layer of federal courts whose judgments are binding on the existing courts of appeals. So fundamental an alteration in the federal judicial system, with side effects that may be extremely detrimental to the administration of justice, ought not to be experimented with even on a temporary basis. If we double the number of cases to be decided on the merits by the Supreme Court and the new tribunal, may we not be encouraging a substantial increase in the number of certiorari petitions, thus adding to the Court's already heavy screening burdens? And since the decisions of the new tribunal will be the law of the land unless and until they are overturned, will not the Supreme Court deem it necessary to scrutinize and monitor the output of the new court even though it is not called upon to review its rulings?

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[77] At the end of the 1975 Term, the number of cases filed in the Second Circuit equalled 1,739 By the end of the 1980 Term, that number had risen to 2,171. Federal Bar Council, Second Circuit Redbook, 1982, at 28 (T. Kingsley ed. 1982). In the year ending June 30, 1981, the number of filings totaled 3,058, and in the year ending June 30, 1982, they totaled 2,826. United States Courts for the Second Circuit: 1982, Report of the Chief Executive 3 (1982).

In his recent address, Judge Feinberg alluded to "staggering increases" in filings at the circuit court and district court levels over the last two decades:

> In the circuit courts of appeal for statistical year 1962, there were 4,823 appeals filed. In the similar period 20 years later, there were almost 28,000. At the trial level, there have been similar spectacular increases in filings. In 1962, 61,836 civil cases were filed in the nation's district courts. Last year, the number reached 206,193.

Feinberg Speech, supra note 37, at 1-2.

[78] S. 645, 98th Cong., 1st Sess. (1983).

[79] Id.; see H.R. 1970, 98th Cong., 1st Sess. (1983); H.R. 7294, 97th Cong., 2d Sess. (1982).

Justice White has proposed yet another solution to the problem of inter-circuit conflicts,[80] which some of the other Justices deem worthy of further exploration.[81] The thrust of his idea is the institution of a new procedure among the courts of appeals that enables them to prevent inter-circuit conflicts from arising in the future. Any appeal before a circuit court of appeals would be heard by the court en banc in either of two instances: where there is an existing inter-circuit conflict, or where the original panel hearing the appeal is disinclined to follow the ruling of a sister circuit. The en banc decision, though contrary to the prior ruling in the other circuit, would thereafter be binding throughout the entire federal system unless and until it is overturned by the Supreme Court.[82] This procedure would have at least two advantages: It would provide uniformity among the circuits, and it would prevent new inter-circuit conflicts from arising. The disadvantage of this plan is that through fortuitous circumstances, the binding precedent could emanate from a court having less expertise than that of the court whose decision is being overturned. Would the quality of justice be improved if a decision in the field of commercial law by the Second Circuit or one in administrative law by the District of Columbia Court of Appeals were to be rejected in an en banc decision by a circuit having had limited exposure to such matters? It is also unclear how existing inter-circuit conflicts would be handled.[83]

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[80] See White Address, supra note 7, at 17.

[81] See, e.g., Brennan Speech, supra note 23, at 15–16.

[82] Justice White did not articulate the details of this procedure or explain how existing inter-circuit conflicts would be handled, though he did suggest this idea could be implemented by rule, without the necessity of additional legislation. White Address, supra note 7, at 17.

[83] Some commentators have recommended other ways of handling inter-circuit conflicts. Judge Feinberg has suggested that the Judicial Conference of the United States designate a select group of law professors to identify on a continuing basis the "relatively noncontroversial conflicts" and bring these to the attention of Congress:

> Once identified in this way for Congress, such problems might well be resolved by legislative action, since many of these conflicts concern matters of statutory interpre-

I believe there are better and less radical steps that can and should be taken before resort to such drastic changes as temporary appeals panels or en banc decisions with binding nationwide effects. Perhaps a better approach to the inter-circuit conflict problem may be found in certain of the specialized appeals courts. In at least one area of the law, this has already been accomplished through the establishment of the Federal Circuit Court of Appeals, which has exclusive jurisdiction over patent and governmental contract controversies.[84] This should be a model for the creation of other specialized tribunals, for it kills two birds with one stone. It relieves both the Supreme Court and the circuit courts of appeals from some of the burdens that currently plague them. From the standpoint of the Supreme Court, the need for granting certiorari is sharply reduced. Specialists are less likely to make mistakes than generalists, and having only one court decide important questions of patent law eliminates the potential for conflict. From the standpoint of the courts of appeals, the specialized tribunal relieves them of the heavy burden of hearing patent appeals, which, because of their lack of scientific training and knowledge, most judges find quite onerous. Unlike the Chief Justice's proposal, which would deplete the manpower of the courts of appeals, the creation of specialized courts would actually increase the number of available judges at the circuit level.

> tation to which a formal expression of legislative intent would be the most appropriate response. Failing that, the committee's work might help the Supreme Court in deciding which petitions for certiorari to grant.

Feinberg, supra note 54, at 627 (footnotes omitted). Other commentators have suggested that where inter-circuit conflicts arise because of conflicting interpretations of a particular statute, Congress should amend the statute to remove the amibiguities that gave rise to inconsistent interpretations. See, e.g., Kurland, Jurisdiction of the United States Supreme Court: Time for a Change?, 59 Cornell L. Rev. 616, 619 (1974).

[84] Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified in scattered sections of 28 U.S.C. (West Supp. 1983)), provides for the merger of the United States Court of Claims and the United States Court of Customs and Patent Appeals into the twelve-judge United States Court of Appeals for the Federal Circuit. Section 127 of the Act provides that the new court shall have substantially all of the jurisdiction of the two courts abolished in the merger. This includes jurisdiction over such matters as appeals in suits against the government, and appeals from the Patent and Trademark Office, the Court of International Trade, the Merit System Protection Board, and the Boards of Contract Appeals. It also includes jurisdiction over patent appeals from the district courts, appeals from final determinations of the United States International Trade Commission relating to unfair practices in import trade, appeals from certain findings of the Secretary of Commerce, and appeals arising under the Plant Variety Protection Act, 7 U.S.C. § 2461 (1982). The Federal Courts Improvement Act of 1982, § 127, 96 Stat. 37–39 (codified at 28 U.S.C. § 1295 (West Supp. 1983)); see S. Rep. No. 275, 97th Cong., 2d Sess. 18–22 (1981), reprinted in 1982 U.S. Code Cong. & Ad. News 11, 28–32 [hereinafter cited as Senate Report]; see also Burger, Year-End Report, supra note 3, at 1–2 (discussing the benefits of the new Court of Appeals for the Federal Circuit).

The creation of similar specialized courts has been recommended for other areas of the law. A particularly likely candidate is a new court to handle all tax appeals. The creation of such a court would be a boon to the other circuits. It probably would lead to a more coherent and cohesive body of tax law and would certainly provide relief to the Supreme Court. Another suggested candidate is a court designed to hear appeals from all of the administrative agencies, such as the Federal Trade Commission, the Securities and Exchange Commission, the National Labor Relations Board and similar agencies. A third possibility is the establishment of a court whose special area of expertise is the resolution of disputes concerning statutory construction.

I would recommend the creation of a new tax court, but I would leave to a future date the creation of additional specialized courts. With the Federal Circuit Court of Appeals already in place, the establishment of a tax court would provide the federal judiciary with two important areas in which to experiment with specialized tribunals. It would be best to wait and see whether these courts function successfully and provide suitable relief to the Supreme Court and the courts of appeals before creating any additional tribunals in other areas.

On yet another front, current legislative procedures must be improved in an attempt to ease the difficult and time consuming task of statutory construction. We currently use a horse-and-buggy technology. For the most part, congressional hearings are unattended by most committee members. Testimony tends to be conflicting, particularly when the legislation at issue is controversial. Committee reports are then prepared, fudging and finessing the difficult questions of construction that eventually lead to protracted litigation. Words and phrases whose purpose the legislators may not fully apprehend are frequently included in reports in order to influence future construction. Debates are spread over hundreds of pages of the Congressional

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In its report to the Senate, the Committee on the Judiciary explained that the Federal Courts Improvement Act was intended to create an appellate forum capable of exercising nationwide jurisdiction over appeals in areas of the law where there was a particular need for nationwide uniformity. Patent law, it was noted, is an area of specialization in which different appellate courts have often reached inconsistent decisions when faced with essentially the same fact patterns. This has produced nonuniformity in the patent laws and encouraged the practice of forum shopping in patent litigation. The Committee noted that the Supreme Court was itself too burdened to resolve the inter-circuit conflicts in the patent laws, and that reform was therefore needed at the intermediate appellate level. The 1982 Act was designed to establish a court of appeals whose jurisdiction would be defined on a topical rather than geographical basis. The Committee predicted this would lead to greater consistency in the patent laws and reduce forum shopping. Senate Report, supra, at 1-7, reprinted in 1982 U.S. Code Cong. & Ad. News at 11-17.

Record and tend to be diffuse, discursive and discontinuous. Rarely are all the debates on a given bill collected in a single volume. Rarely do they focus on the questions that are later litigated. One seeking to ascertain congressional intent must wade through hearings, reports and debates—an enterprise which is singularly unenlightening and unrewarding. Consider the plight of a lawyer in advising a client as to the meaning of a newly enacted statute. The legislative materials may not be available, or if they are, there may be insufficient time for the lawyer to consult them. Proponents of legislation understand that precision of expression invites opposition, while ambiguity is conducive to agreement. It is thus not surprising that the justices disagree on what Congress intended. Both the majority and minority can usually find an apt quotation to support its interpretation of the legislation.

The jugular question is this: Why should we impose on the Supreme Court the unrewarding task of unraveling the complex strands of legislative history? We should insist upon a revision of congressional procedures. At the very least, the debates should be collated for every piece of legislation. The appropriate committee should be required to prepare a postconference report indicating what changes, if any, have been made in the measure during the course of the debates. Hearings should not be considered a part of the legislative record, as they are designed primarily to enlighten and educate the committee and are unknown to and unread by most of the legislators. The intent of Congress should be derived from the committee's reaction to the hearings as evidenced by its report and by the debates, not from the testimony of proponents or opponents.

By modernizing legislative procedures and compelling Congress to document its purposes more clearly, the task of the judiciary would be lightened considerably. Legislation would be better drafted if the courts, rather than undertaking to correct every defect in the measure, required Congress to remove the ambiguities itself. Why, for example, should the courts be required to guess whether Congress intended a private right of action to be implied when one was not expressly provided for?[85] Why shouldn't the Court compel Congress to be specific one way or the other? Less indulgent standards of construction would lead to higher standards of draftsmanship and place the responsibility for deciding vexing questions of policy where it belongs—with the democratically elected lawmakers. It is time we recognize that when legislation is unclear, it is unfair to those subject to its requirements to be compelled to act at their peril.

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[85] See Cort v. Ash, 422 U.S. 66 (1975), and its confusing progeny; cf. National Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Bd., 618 F.2d 819, 828 (D.C. Cir. 1980) (plain language of the statue and not the contrary legislative history should control).

With these changes in place—and without radical structural reforms—the Court should be able to handle not only the inter-circuit conflict problem but its calendar difficulties as well.

IV. THE COURT'S CONTRIBUTION TO ITS ESCALATING CASELOAD

When one appreciates the limitless hours the Justices must spend in keeping abreast of the Court's swollen calendars, the vast amount of research that goes into the writing of opinions, the complexity, difficulty and unprecedented nature of the questions to be decided, the relentless pressures under which the Justices operate, the awesome responsibility for formulating doctrines that affect the lives and welfare of our people, the overall high quality of their juristic output and, finally, the fact that of the three organs of government, the Supreme Court is by all odds incomparably superior, it may seem presumptuous for a commentator to call attention to some of the ways in which the Court itself has contributed to its intolerable burdens. However, unless the Court recognizes that it is a part of the problem, it may fail to make ameliorative or structural changes. The Chief Justice has repeatedly solicited constructive suggestions from the bar on how the Court can best cope with its ever-expanding obligations.

The thoughts that I shall express are hardly original and go little further than to restate the self-criticisms of some of the Justices. My documentation comes principally from the fields in which I have long toiled. I shall discuss the vice of plurality opinions, the Court's proclivity for opening one Pandora's box after another, and the perception that the Court sometimes seems to function as a Ministry of Justice rather than a court of law.

It is a familiar complaint that the Court's opinions are much too long, especially when there are separate concurrences as well as dissents. Compared, however, with the opinions of Chief Justice White and the first Justice Harlan, present day decisions are a model of brevity. The length of an opinion is a matter of personal choice. All judges believe that the opinions of others are much too long while their own are always as succinct as the case permits. Complaints about the undue length of opinions are an irritant and will lead nowhere. I have no patience with the notion that there are too many dissents and that the Justices should submerge their individual views in the interest of achieving unanimity. Dissenting opinions have played a signal role in Supreme Court jurisprudence.[86] The dissents, for example, of Justices Holmes, Brandeis, Stone and Cardozo against the use of the due process clause to veto state economic regulations ultimately became the view of later majorities. There is no better way to test the soundness of a ruling than in the crucible of dissent.

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[86] As Chief Justice Hughes wrote: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly

The plurality opinion, however, is something else again. It is essentially an anomaly. Its rationale does not have the force or effect of a binding precedent.[87] A decision that is not definitive leaves the questions presented unanswered and unsettled. The bench, the bar and the public are thus denied the guidance that only a court of last resort can furnish. Is not a plurality decision a confession of failure on the part of the Court to discharge its responsibilities?[88] This failure stimulates more and more litigation that engulfs the lower courts and ultimately results in additional appeals to the Court itself.[89]

The inability of the Court to muster a majority is possibly attributable in part to its heavy work load, which leaves the Justices with no time for adequate consultation and exchange of views. Also at fault may be personality differences—an unwillingness to yield, a desire to preserve a position for other cases down the road or the inherent difficulty of the issue. Whatever the reason, the situation cries out for corrective action. The Justices must be aware that a cacophony of conflicting voices introduces a degree of uncertainty and confusion into the law that we can well do without.

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correct the error into which the dissenting judge believes the court to have been betrayed." C. Hughes, The Supreme Court of the United States 68 (1928). For many examples of such dissents, see P. Jackson, Dissent in the Supreme Court (1969).

[87] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds . . . .' " Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)); see Davis & Reynolds, Juridical Cripples: Plurality Opinions in the Supreme Court, 1974 Duke L.J. 59, 81; Note, The Precedential Value of Supreme Court Plurality Decisions, 80 Colum. L. Rev. 756, 761, 769 (1980); cf. Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982) (discussing Pico v. Board of Educ., 457 U.S. 853 (1982), in which "[a] majority of the justices did not join any single opinion"), cert. denied, 103 S. Ct. 1274 (1983); United States v. Bradshaw, 490 F.2d 1097 (4th Cir.) (relying on various plurality opinions of the Supreme Court to find a fourth amendment violation), cert. denied, 419 U.S. 895 (1974).

[88] "More than a mere agreement on the result is needed; without a majority rationale for the result, the Supreme Court abdicates its responsibility to the institutions and parties depending on it for direction. Each plurality decision thus represents a failure to fulfill the Court's obligations." Note, Plurality Decisions and Judicial Decisionmaking, 94 Harv. L. Rev. 1127, 1128 (1981).

[89] See Miller v. California, 413 U.S. 15 (1973); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957).

Having taught and practiced law for close to six decades, I cannot believe that with adequate discussion a majority should be unable to agree upon a single rationale for the Court's ruling, if there is a will to achieve a consensus and the recognition that the Justices are expected to find some common ground on which to base the Court's decision. If the lower courts are to interpret the holding as resting on the narrowest ground for which there is a majority, why shouldn't the several opinions be so limited or agreement reached per curiam, leaving to another day the elaboration of views when they do command a majority? When, as a clerk, I did not like some of the comments that came to Justice Stone from the other Justices and thought their suggestions should be rejected, he would point to the opening sentence of every decision which states specifically that the Justice was delivering the opinion of the Court. He always underlined the word *Court*. He regarded it as his duty to make the concessions required to retain (or obtain) the support of his colleagues. He searched for a common denominator that would produce a consensus. There may be, of course, occasions when the Court has no alternative but to resort to a plurality opinion. Manifestly, there can be no rigid rule in this regard. However, there should be a strong presumption against decision by a mere plurality and every reasonable effort should be made to avoid such disposition.

The practice of filing separate concurring opinions can be either beneficial or harmful, dependent upon their nature. Frequently, they sharpen and clarify the Court's opinions and make the exact holding more precise. They may indicate that the majority is overstating the controlling principle or denying it any generative effect by expressing it in terms much too narrow. Anything that makes the law more certain and comprehensible is to be commended. On the other hand, the concurrence may subvert the holding and create doubts and uncertainty as to whether the Court will adhere to its *ratio decidendi* in later cases. This obviously invites further litigation in which the Court will be urged to reconsider the doctrine of the earlier case, and deprives the judicial process of its quintessential elements of stability and order.

The Court is more than an aggregate of individual justices. It should, to the fullest extent possible, speak with one voice. Before a concurring opinion is published, the writer of the Court's opinion might do well to ask himself whether his colleague's views cannot be accommodated by suitable revisions. Correlatively, the author of every concurrence should ask himself whether the public interest will be served by the expression of his individual views. It is evident that there are not enough hours in the day for the Justices to perform all the tasks that are heaped upon them. It is little short of miraculous that they are able to dispatch all the business they face each term. They all agree that they have reached the limits of their capacity and, if their calendars continue to grow, that they will fall behind in their work. Something has to give. Fewer concurring opinions might be one way out.

Both the Warren and Burger Courts have had a proclivity for opening Pandora's boxes that has resulted in the proliferation of new litigation, an outcome which should have been foreseen before the covers were lifted. Recent lines of cases in the antitrust area provide examples of such costly jurisprudential forays.

In 1964, Justice Black authored decisions in *Sears, Roebuck & Co. v. Stiffel Co.*[90] and *Compco Corp. v. Day-Brite Lighting, Inc.*[91] that effected revolutionary changes in the law of unfair competititon. The Court ruled that it is not consonant with the federal patent laws for a state court to enjoin the copying of an unpatented or unpatentable article, regardless of whether the copying has the effect of confusing the public, whether the configuration of the article has acquired a secondary meaning, or whether the copied features are functional. These factors were deemed irrelevant because, absent a patent, every article is in the public domain and therefore may be freely imitated.[92]

Prior to these decisions, the law was settled that imitation of the dress and appearance of an article was privileged, except where its nonfunctional features had acquired a secondary meaning and the simulation was likely to deceive the purchasing public. As Holmes and Brandeis put it, sharing in the good will of a product is permissible while sharing in the good will of a producer is not.[93] This rule is qualified where the product is identified by its functional features; duplication in such a case is not actionable even though the copier may in fact be sharing in the producer's good will. Were the imitation forbidden, the first user of the functional elements would enjoy a monopoly in an unpatented product.

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[90] 376 U.S. 225 (1964).

[91] 376 U.S. 234 (1964).

[92] "To forbid copying would interfere with the federal policy, found in Art. I, § 8, cl. 8 of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain." Id. at 237; see also Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 522 (1964) (Black, J., dissenting) ("When articles are not patentable and therefore are in the public domain, . . . to grant them a legally protected monopoly offends the constitutional plan of a competitive economy free from patent monopolies except where there are patentable 'Discoveries.' ").

[93] See Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 120–22 (1938); Saxlehner v. Wagner, 216 U.S. 375, 380–81 (1910).

Placing imitation on a constitutional pedestal, Justice Black held that the simulation of nonfunctional as well as functional features was privileged and could not be enjoined. This meant that the states could no longer protect their citizens from the deception inherent in the reproduction of nonfunctional features that identified the source and origin of a product. This holding permitted the unscrupulous merchant to share in the producer's good will and thereby deceive the public. The measures Black suggested to minimize such deception were totally inadequate.[94] As might have been expected, the decisions evoked a mass of critical commentary[95] and opened the floodgate to a deluge of litigation.[96] Over time, the Black rationale has been severely limited by the courts, and state laws of unfair competition have regained their potency as instruments for curbing consumer frauds.[97] The cost, however, has been tens of thousands of hours of judicial effort and the expenditure of millions of dollars by litigants.

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[94] See Handler, Product Simulation: A Right or a Wrong?, 64 Colum. L. Rev. 1183, 1186–87 (1964).

[95] E.g., Hearings on H.R. 4651 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 1st Sess. 18, 26 (1964) (statement of Sidney A. Diamond that one of the most deplorable effects of *Sears* and *Compco* is their apparent endorsement of a low standard of commercial morality); Chapman, The Supreme Court and Federal Law of Unfair Competition, 54 Trade-Mark Rep. 573 (1964); Derenberg, The Seventeenth Year of Administration of the Lanham Trademark Act of 1946, 54 Trade-Mark Rep. 655, 699–706 (1964); Kunin, The Lindsay Bill Before and After the Stiffel Case, 54 Trade-Mark Rep. 731, 741–45 (1964); Leeds, The Impact of Sears and Compco, 55 Trade-Mark Rep. 188 (1965); Peterson, The Legislative Mandate of *Sears* and *Compco*: A Plea for a Federal Law of Unfair Competition, 69 Dick. L. Rev. 347 (1965), reprinted in 56 Trade-Mark Rep. 16 (1966); Urey, Product Simulation—Before and After the Stiffel Case, 55 Trade-Mark Rep. 947 (1965); Product Simulation: A Right or a Wrong?, 64 Colum. L. Rev. 1178 (1964) (analysis by five authors); The Supreme Court, 1963 Term, 78 Harv. L. Rev. 143, 309–12 (1964); Note, Unfair Competition and the Doctrine of Functionality, 64 Colum. L. Rev. 544, 569 (1964); Note, Unfair Competition: Simulation of Unpatented Goods, 50 Cornell L.Q. 118, 124–25 (1964); Note, Unfair Competition After *Sears* and *Compco*, 22 Vand. L. Rev. 129 (1968); Comment, Does *Stiffel* Stifle the Law of Unfair Competition?, 37 U. Colo. L. Rev. 86 (1964).

[96] For cases discussed or summarized, see Ahrens, The Misappropriation Doctrine After Sears-Compco, 59 Trade-Mark Rep. 88, 101–13 (1969); Dannay, The Sears-Compco Doctrine Today: Trademarks and Unfair Competition, 67 Trade-Mark Rep. 132, 147–68 (1977); Goldstein, The Competitive Mandate: From Sears to Lear, 53 J. Pat. Off. Soc'y 627, 628 n.6 (1971); Peterson, supra note 95, at 358–63, reprinted in 56 Trade-Mark at 28–34.

[97] See Dannay, supra note 96, at 138–46; Germain, Sears/Compco Revisited: May Products and Packages be "Simulated" in the Late Seventies?, 1978 Am. Pat. L.A. Bull. 160, 170–72 (and cases cited therein); Note, The "Copying-Misappropriation" Distinction: A False Step in the Development of the *Sears-Compco* Pre-emption Doctrine, 71 Colum. L. Rev. 1444, 1455 (1971); Comment, Unfair Competition and Product Simulation: Reactions to *Sears* and *Compco*, 18 S.D.L. Rev. 480, 490–93 (1973).

The merger decisions under the Celler-Kefauver Anti-Merger Act[98] tell very much the same story. Beginning with *United States v. Philadelphia National Bank*,[99] the Court converted the statute from an enactment designed to prevent the substantial lessening of competition into one preventing increases in concentration—particularly in already concentrated industries.[100] Section 7[101] jurisprudence was thereafter reduced to a mere numbers game of market shares and concentration ratios.[102] Coupled with this restrictive reading of the Anti-Merger Act was an unrealistic approach to the threshold issue of market definition. Markets were consistently gerrymandered so as to magnify the market shares of the challenged combination.[103] There has been a retreat in recent years from these untenable rulings,[104] many of which run counter to the present enforcement policies of the Department of Justice and the Federal Trade Commission as exemplified by their merger guidelines.[105] The federal reporters are full of lengthy opinions of district courts and courts of appeals applying the Supreme Court's rulings to numerous mergers challenged in governmental and private suits. Many of these decisions are already obsolete.[106] We pay a large price in the law when extremes reign supreme only later to be moderated. Some, but not all, such decisional flaws are inevitable.

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[98] Ch. 1184, 64 Stat. 1125 (1950) (amending section 7 of the Clayton Act, 15 U.S.C. § 18 (1982)).

[99] 374 U.S. 321 (1963).

[100] The Court stated that "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." Id. at 365 n.42.

[101] 15 U.S.C. § 18 (1982).

[102] In United States v. Aluminum Co. of Am., 377 U.S. 271 (1964), the *Philadelphia Bank* footnote was elevated to the text and became the governing principle in determining the legality of horizontal mergers. Violation was found when Alcoa with 27.8% of a concentrated market acquired Rome with an additional 1.3%. The merger in United States v. Continental Can Co., 378 U.S. 441 (1964), involved market shares of 21.9% and 3.1.%. The nadir of this development was reached in United States v. Von's Grocery Co., 384 U.S. 270 (1966), where the combined market share was 7.5%, and in United States v. Pabst Brewing Co., 384 U.S. 465 (1966), where the merger provided a mere 4.5% of the national beer sales.

[103] See United States v. Grinnel Corp., 384 U.S. 563, 572 (1966); United States v. Continental Can Co., 378 U.S. 441 (1964); Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); International Boxing Club, Inc. v. United States, 358 U.S. 242 (1959).

[104] See, e.g., United States v. General Dynamics Corp., 415 U.S. 486 (1974). The principal merger cases have been analyzed and discussed by me in my annual lectures, which are compiled in M. Handler, Twenty-five Years of Antitrust (1973). See also Robinson, Recent Antitrust Developments: 1982, 4 Cardozo L. Rev. 551, 551-76 (1983) (discussing the new merger guidelines' departure from Supreme Court precedents); Robinson, Antitrust Developments: 1974, 75 Colum. L. Rev. 243 (1975) (discussing the possible retreat from the "unhealthy trend" of earlier cases); Robinson, Antitrust Developments: 1973, 74 Colum. L. Rev. 163, 180-90 (1974) (principal merger cases "only add to the uncertainty that enshrouds this important area of our merger jurisprudence").

[105] Horizontal Mergers: Statement of FTC, Trade Reg. Rep. Extra Edition (CCH) No. 546, at 71-87 (June 16, 1982); Merger Guidelines of Dep't of Justice—1968, 2 Trade Reg. Rep. (CCH) ¶ 4510 (Aug. 9, 1982).

In *United States v. Yellow Cab Co.*,[107] the Court stated that an illegal restraint "may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent."[108] In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*,[109] Justice Black reiterated this view, asserting that "common ownership and control does not liberate corporations from the impact of the antitrust laws."[110] This intra-corporate conspiracy doctrine was reaffirmed in Justice Black's plurality decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*[111] "[S]ince respondents . . . availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."[112] It is noteworthy that in each of these cases, the decision could have been based on much narrower grounds, thereby avoiding the confusion engendered by these over-broad and absolute dicta. Given the unrealistic nature of the doctrines so enunciated, it is not surprising that the lower courts have attempted to formulate some alternative rationale in attempts to circumscribe the rule's potential sweep. While some lower courts have given literal application to the intracorporate conspiracy concept, others have held that the capacity of the members of a corporate family to conspire in violation of the antitrust laws cannot be determined solely from the fact of separate incorporation, but must be decided after analyzing all the facts and circumstances regarding their relationships. Still others have restricted liability to cases where the affiliated companies have held themselves out as competitors, and yet others have sought to limit the doctrine in a variety of different ways.[113] More than 135 cases have been brought in the courts to determine the scope of the intracorporate conspiracy principle.[114] Recently, there has been granted a petition for certiorari in which the Court was asked to determine once and for all whether there should be section 1[115] liability where the plurality of actors consists of wholly owned subsidiaries or affiliates within a single corporate family.[116] The avoidance of overbroad formulation of doctrine could have spared the federal courts this huge and expensive volume of antitrust litigation.

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[106] See Malina, The Antitrust Jurisprudence of the Second Circuit, 37 Rec. A.B. City N.Y. 436 (1982); Malina, Merger Decisions in Second Circuit Stress Need for Anticompetitive Effect, N.Y.L.J., June 7, 1982, at 23, col. 1.

[107] 332 U.S. 218 (1947).

[108] Id. at 227.

[109] 340 U.S. 211 (1951).

[110] Id. at 215.

[111] 392 U.S. 134 (1968).

[112] Id. at 141–42.

[113] See Handler & Smart, The Present Status of the Intracorporate Conspiracy Doctrine, 3 Cardozo L. Rev. 23 (1981); Handler, Reforming the Antitrust Laws, 82 Colum. L. Rev. 1287, 1292–95 (1982).

There are two other examples that can be discussed very briefly. In *Perma Life Mufflers*, Justice Black, speaking for Chief Justice Warren, Justices Douglas and Brennan and himself, declared that "the doctrine of *in pari delicto*, with its complex scope, contents and effects, is not to be recognized as a defense to an antitrust action."[117] Justice White concurred in "the opinion and judgment of the Court," with some personal observations. Justices Fortas and Marshall, in separate opinions, concurred in the result. Justices Harlan and Stewart, in an opinion by the former, concurred in part and dissented in part. It it not surprising that a fragmented ruling of this kind injected confusion and uncertainty into the law and has stimulated a considerable body of new litigation. Determining how much of the doctrine of *in pari delicto* still retains its vitality[118] is like solving a Chinese puzzle. I have taken the position that *in pari delicto* is still a valid antitrust defense when properly applied within the limitations of its common law origins.[119]

The final example is the state action defense, a subject on which I have written many times.[120] Once the Court began to erode the doctrine of *Parker v. Brown*,[121] the floodgates were opened to a huge volume of antitrust suits challenging actions taken pursuant to state enactments. In two recent cases, *City of Lafayette v. Louisiana Power*

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[114] See cases cited in Handler & Smart, supra note 113, passim.

[115] Sherman Anti-Trust Act, 15 U.S.C. § 1 (1982).

[116] Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310 (7th Cir. 1982), cert. granted, 103 S. Ct. 3100 (1983).

[117] 392 U.S. at 140.

[118] See Handler & Sacks, The Continued Vitality of *In Pari Delicto* as an Antitrust Defense, 70 Geo. L.J. 1123 (1982).

[119] See Handler, supra note 113, at 1358.

[120] See Handler, Twenty-fourth Annual Antitrust Review, 72 Colum. L. Rev. 1, 4 (1972); Handler, The Current Attack on the *Parker v. Brown* State Action Doctrine, 76 Colum. L. Rev. 1 (1976); Handler, Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977, 77 Colum. L. Rev. 1363, 1374 (1978); Handler, supra note 113, at 1330.

[121] 317 U.S. 341 (1943).

& Light Co.[122] and *Community Communications Co. v. City of Boulder*,[123] the Court excluded from the ambit of *Parker v. Brown* the ordinances of local governments, holding that they are sheltered only if specifically authorized by the state legislature and if the local government, in administering its enactments, is acting as an agent of the state. Since it is estimated that there are more than sixty thousand local governments in this country, and having regard for the diversity of the regulations of local businesses, the Pandora's box which *Lafayette* and *Boulder* have opened will probably turn out to be the largest in the history of Supreme Court jurisprudence.[124] If the Court felt that it was desirable to so limit the state action defense, would it not have been the better practice for it to have left this to Congress for formulation of corrective measures?[125]

My sole purpose in referring to these examples is to indicate that the Court itself has contributed to the explosion of litigation in this country and thus is not without some responsibility for the burgeoning of its calendars.

In 1921, Judge Cardozo, recognizing that basic reforms in the law could best be accomplished through legislative action, issued a clarion call for the establishment of Ministries of Justice in the various states.[126] The Ministry of Justice, he believed, would be alert to the need for change and would undertake the scholarly studies essential for effective legislative action.[127] The creation of such a Ministry as a part of the national government is long overdue.

Many Commentators believe that the Warren and Burger Courts have misconceived their function, and instead of acting as a court of last resort, have tended to operate as a Ministry of Justice. I do not want to enter the debate regarding judicial activism versus strict constructionism, the exaltation of precedent versus adaptation to changing needs and circumstances, the limitation of the creative aspect of the judicial process to interstitial as contrasted with far reaching changes or to the important elements of process and equal protection. The debate is largely concerned with labels. It is not unusual for a justice to be a strict constructionist in one area and an activist in another, and for his allegiance to *stare decisis* to fluctuate from case to case. This is as true of the members of the Burger Court as it was of the Warren Court.

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[122] 435 U.S. 389 (1978).

[123] 455 U.S. 40 (1982).

[124] See Antitrust & Local Government: Perspectives on the *Boulder* Decision (J. Siena ed. 1982); Areeda, Antitrust Immunity for "State Action" After *Lafayette*, 95 Harv. L. Rev. 435, 439 (1981); Slater, Local Governments and State Action Immunity After *City of Lafayette* and *City of Boulder*, 51 Antitrust L.J. 349 (1983); State Developments, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 1110, at 801, 806, 809, 811 (Apr. 14, 1983).

[125] See International News Serv. v. Associated Press, 248 U.S. 215, 262-63, 267 (1918) (Brandeis, J., dissenting).

[126] Cardozo, A Ministry of Justice, 35 Harv. L. Rev. 113 (1921).

[127] Id. at 125-28.

A lasting solution to the problems that now deeply concern the Justices and that are reflected in the addresses summarized in the first part of this Article, can only be found if the Justices overcome the tendency to open Pandora's boxes, better exercise their "own sense of self restraint," and recognize, in the words of Justice Stone, that "Courts are not the only agency of government that must be assumed to have the capacity to govern."[128]

CONCLUSION

Judge Friendly has pointed out that to avert the flood we must control the flow. It makes no sense to solve one court's problems by increasing those of the other courts in the federal system. Court congestion must be attacked frontally and at all levels. I applaud the Chief Justice's proposal that a comprehensive study be made by a commission representing all branches of government and the public, and I trust that the pending legislation to carry out this recommendation will be enacted promptly. In the meantime, I would urge that the measures reviewed in this Article which do not call for radical structural changes be given the earnest consideration of the Supreme Court and of Congress—all with the cordial support of the profession.

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[128] United States v. Butler, 297 U.S. 1, 87 (1936) (Stone, J., dissenting).

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CHAMBERS OF
JAMES L. OAKES
CIRCUIT JUDGE
BRATTLEBORO VERMONT 05301-0696

October 31, 1985

Hon. Patrick J. Leahy
United States Senate
Washington, DC 20510

Re: National Court of Appeals

Dear Senator Leahy:

In response to your recent letter, as I have written on several occasions in the past, I agree completely with the enclosed statement of my own Chief Judge, Wilfred Feinberg, made September 22, 1983, before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, as well as the statement of Chief Judge Donald P. Lay of the Eighth Circuit Court of Appeals before the same subcommittee on September 25, 1983, in opposition to the proposal chiefly sponsored by the Chief Justice of the United States (though opposed by several of the Justices themselves). I also endorse Judge Winter's testimony before the Subcommittee of October 9, 1985.

I agree also with the March 12, 1985, editorial of the New York Times and the study of Professors Sexton and Estreicher of New York University Law School that the Court does not manage its docket well and that there are numerous other ways in which it can lighten its caseload without drawing from the hard-pressed Courts of Appeals for the services of their judges. And I would add that, to those of us such as yourself who are interested in the administration of justice, the proposal for a National Court of Appeals can only mean additional expense and delay to the parties to litigation.

The only reason advanced in favor of such a court is to resolve nonconstitutional intercircuit conflicts, say as in antitrust or securities law standards or practice variations between the circuits. But these are not the kind of issues that require immediate reform; rather, they are issues where case-to-case resolution and different factual contexts probably permit for better "percolation" than if one national court were to monitor the Courts of Appeals.

There is an additional reason for opposition to such a court which some people may hesitate to say but which I do not. The appointment of circuit judges to the National Court of Appeals would likely be too much influenced by whoever might be the Chief Justice himself so as to create an additional stronghold of power in one man. This has no reference to Chief Justice Burger himself. No matter who the man occupying his position may be, and irrespective of his own political and social or economic views or values, the concentration of too much institutional power in one person runs contrary to all of the teachings of the Founding Fathers, to the spirit of the Federalist Papers, and to the basic proposition in American life that dispersion of power is the people's best safeguard.

I find it more difficult, however, to answer your direct question, "What is wrong with giving it a temporary tryout?," the basis on which the Chief Justice has tried to sell it to the American Bar (without success to date) and by which you indicate he is attempting to persuade the Senate Committee to adopt his proposal. My principal answer would be that any temporary institution, including an "experimental" court, tends to be self-perpetuating. May I give you as an example the Temporary Emergency Court of Appeals, explicitly enacted as a "temporary" court (with sole power in the Chief Justice to appoint its judges), I believe by Public Law No. 91-379 on August 15, 1970. Fifteen years later the TECA, as it has come to be called, has its own set of rules, its jurisdiction has been extended, and even the name "Temporary," which is part of its official name, has totally lost its significance. Moreover, as Chief Judge Feinberg's attached statement pointed out (pp. 14-15), far more than five years would be involved in any evaluation, with jurisdictional problems likely to arise at some point.

In short, why experiment with a bad thing? I simply recall to you and to the Subcommittee, if you care to bring this letter to its attention, the old Vermont saying, "If it ain't broke, don't fix it."

Sincerely yours,

James L. Oakes

James L. Oakes
U. S. Circuit Judge

cc: Chief Judge Feinberg
Judge Winter